No. 10214

United States
Circuit Court of Appeals
For the Ninth Circuit.

TODD W. JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

Todd W. Johnson,
433 S. Spring St.,
Los Angeles, Calif.

For Appellee:

Wm. Fleet Palmer,
United States Attorney.
E. H. Mitchell,
Assistant United States Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United Statss in and for the Southern District of California, Central Division.

No. 1195-RJ-Civil

TODD W. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR THE RECOVERY OF FEDERAL INCOME TAXES

Comes now the plaintiff and complains of defendant and for his cause of action alleges as follows:

I.

That plaintiff, Todd W. Johnson, is now and at all times mentioned herein was a resident of the County of Los Angeles, State of California, and subject to the jurisdiction of this Court.

II.

Plaintiff is a citizen of the United States of America, has always borne true faith and allegiance thereto, and has never in any way either directly or indirectly aided or abetted anyone in rebellion thereagainst.

III.

The jurisdiction of this Court in the premises is dependent upon a Federal question in that the cause

of action arises under the laws of the United States pertaining to the Internal Revenue.

IV.

On or before March 15, 1936, the plaintiff filed his Federal income tax return for the calendar year 1935, reporting therein net taxable income of $26,541.18 and tax payable thereon of $3,118.95 which he paid to defendant during the calendar year 1936.

V.

Subsequent to March 15, 1936, the Commissioner of Internal Revenue made his audit of plaintiff's said income tax return and erroneously determined that plaintiff was liable for deficiency tax for said year 1935 in the amount of [2] $7,821.89, plus interest of $1,025.84, or a total of $8,847.73.

VI.

Said alleged deficiency tax resulted from the said Commissioner erroneously and illegally determining that plaintiff had a taxable net income of $54,860.13, whereas plaintiff had a correct taxable net income of only $28,074.31.

VII.

Said Commissioner erroneously determined that taxpayer was taxable on all of the following fees received by him during the calendar year 1935, whereas he was only taxable on one-half thereof:

Viber Company legal work	$ 112.00
Roy Tracy Income tax work	55.00
Wm. G. Kerckhoff Estate for legal work	31,791.67
Total	$31,958.67
One-half	$15,979.28

VIII.

Said fees were the community property of Esther Jeanne Johnson and plaintiff, were earned prior to March 4, 1935, were accounts receivable on said date, were collected between March 4, 1935, and December 31, 1935, and only one-half thereof was taxable to plaintiff and the other one-half thereof was taxable to Esther Jeanne Johnson, the then wife of plaintiff.

IX.

Said Commissioner erroneously determined that plaintiff's taxable distributable share of the earnings of Johnson & Johnston, a partnership, as determined by him, was $23,912.41, whereas his correct taxable share of such earnings as determined by said Commissioner, was $13,881.27. The difference of $10,031.14 represents one-half of $20,062.28, which in turn represents the community property interest of said Esther Jeanne Johnson and plaintiff in the collections of Johnson & Johnston from March 4, 1935, to December 31, 1935, all of which were earned prior to March 4, 1935, but were accounts receivable on that date and were collected between March 4, and December 31, 1935. Plaintiff is not taxable upon the community one-half of Esther Jeanne Johnson of said fees.

X.

For more than nine years prior to January 1, 1935, plaintiff and Esther [3] Jeanne Johnson were husband and wife, and during all of said period resided in the County of Los Angeles, State of California. Plaintiff engaged in the practice of law in the City of Los Angeles on July 1, 1929, and continued such practice to May 26, 1933, without any association with any other attorney. On May 26, 1933, plaintiff and one Philip D. Johnston, an attorney at law theretofore employed by plaintiff, entered into a partnership under the firm name of Johnson & Johnston, to engage in the practice of law. This partnership has continued to the present time. In said partnership it was provided that portions of certain fees for work already done by plaintiff on cases in progress should not belong to the partnership, but should belong to plaintiff. The fees set forth in paragraph VII hereof consist of fees which were paid directly to plaintiff under said partnership agreement.

XI.

On March 5, 1935, Esther Jeanne Johnson filed an action in the Superior Court of Los Angeles County, California, against plaintiff praying for a divorce from him. On April 1, 1935, said court entered an interlocutory decree of divorce, and on April 2, 1936, said court entered an final decree of divorce, completely and finally dissolving and severing the bonds of matrimony between her and plaintiff.

XII.

After considerable negotiations between the attorneys for Esther Jeanne Johnson and plaintiff a property settlement agreement was entered into between Esther Jeanne Johnson and plaintiff, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof the same as if set forth in full in words and figures herein.

XIII.

At the same time that said Commissioner erroneously determined that plaintiff owed a deficiency income tax for the calendar year 1935, in the sum of $7,821.89, plus interest of $1,025.84, or a total of $8,-847.73, he also determined that said Esther Jeanne Johnson had made an over-payment of her income tax for the calendar year 1935 in the sum of $3,006.80, which she was entitled to have refunded together with interest of $328.47, or a total of $3,335.27. This over-payment resulted from the erroneous determination by said Commissioner that plaintiff was taxable on all of his earnings, both individually and as a partner in Johnson & Johnston, from March 4, 1935, to December 31, 1935, whereas plaintiff was taxable only on his community one-half thereof. By agreement between Esther Jeanne Johnson, said Commissioner and plaintiff said over-payment and interest thereon was credited against said purported deficiency income tax and interest, and on June 11, 1938, plaintiff paid to defendant the difference of $5,512.56.

XIV.

That plaintiff on April 2, 1940, filed his claim for refund with defendant in the sum of $7,148.11. A true and correct copy thereof is attached hereto, marked Exhibit "B", and made a part hereof by reference. More than six months has elapsed since the filing of said claim and on September 21, 1940, said Commissioner rejected said claim for refund in full. A true and correct copy of his letter rejecting said claim is hereto attached, marked Exhibit "C".

XV.

That as a part of said agreement to credit said overassessment of Esther Jeanne Johnson against said purported deficiency income tax of plaintiff, the said plaintiff agreed with said Commissioner that in the event plaintiff should file a claim for refund or court action for recovery of income tax paid by him for the year 1935 on income held to be his separate property and not community property, any recovery on the community property basis shall be limited to the net amount after giving effect to the resulting tax due from his wife and barred from assessment against her by the statute of limitations.

XVI.

That if plaintiff's complaint is sustained in full he will be entitled to a refund of $7,326.45 income tax for the year 1935 and there would be a deficiency income tax of $3,948.68 for 1935 due from Esther Jeanne Johnson, his former wife, making a net re-

fund of income tax for 1935 of $3,377.77 due plaintiff, plus $450.38 interest to June 11, 1938, the date of payment thereof, or a total of $3,828.15. Plaintiff would be entitled to interest at 6% on said $3,828.15 from June 11, 1938, as provided by law. [5]

XVII.

Said Commissioner in determining the net income of Johnson & Johnston, a partnership, erroneously disallowed deductions claimed by said partnership as follows:

Club dues and expenses of Philip D. Johnston at Bel Air Country Club		$ 587.21
Club dues and expenses of Todd W. Johnson at Los Angeles Country Club	419.42	
at Stock Exchange Club	13.91	433.33
Total Club dues and expenses disallowed		$1,020.54

That said plaintiff had a 75% interest in the net earnings of said partnership and by disallowing said club dues and expenses said Commissioner erroneously increased the net income of plaintiff by 75% thereof, or $775.40. Said club dues and expenses were expended in entertaining clients and prospective clients, and for no other purpose and were a proper deduction for income tax purposes.

XVIII.

Prior to January 1, 1935, said Philip D. Johnston and plaintiff had agreed that said partnership

should pay said club dues and expenses out of the income of the partnership before computing the net income thereof to be distributed in the proportion of 75% to plaintiff and 25% to said Philip D. Johnston. In view of this oral modification of the partnership agreement the net income of plaintiff should only be increased by the amount of the club dues and expenses paid by the partnership for him or $433.33 even if said club dues and expenses are determined by this court not to be proper deductions for income tax purposes.

XIX.

Said claim for refund is the only claim for refund filed by plaintiff in the premises and has not been sold, assigned, or otherwise transferred or disposed of to any other person, and is the property of the plaintiff at the present time.

XX.

The defendant erroneously and illegally collected from the plaintiff and is illegally withholding from plaintiff, and is indebted to the plaintiff in the [6] sum of $3,828.15, together with interest thereon from June 11, 1938, as provided by law, representing amounts illegally exacted from plaintiff as Federal Income Tax for the year 1935, and interest thereon to June 11, 1938. Although often demanded by plaintiff, defendant has not, nor has anyone for it, repaid or refunded said sum or any part thereof to plaintiff, or to anyone else for plaintiff's use, benefit or account.

FOR ANOTHER FURTHER AND SECOND CAUSE OF ACTION

I.

Plaintiff realleges and here incorporates in this his second cause of action Paragraphs I to XX, inclusive, of his First Cause of Action, and such reference makes the same a part of this cause of action the same as if specifically set forth herein.

II.

During said negotiations leading up to said property settlement agreement set forth in Paragraph XII plaintiff offered to transfer to said Esther Jeanne Johnson one-half of all community property then owned and in addition to pay her one-half of his collection from fees received for legal services as an attorney up until the date a final degree of divorce was entered, all of which constituted her vested one-half interest in the community estate. Esther Jeanne Johnson rejected this offer stating that she desired to receive specific properties, free and clear of debt, and a definite amount of cash rather than to have a one-half interest in all the community property, including one-half of an indefinite amount of cash from fees as collected by plaintiff.

III.

As a result of said negotiations said property settlement agreement was entered into. Pursuant to said property settlement agreement and in complete performance by plaintiff of its terms he transferred

to Esther Jeanne Johnson property of a value at least $26,010.42 in excess of the value of her one-half interest in the community property existing on March 4, 1935, other than fees earned by plaintiff. [7]

IV.

Under said property settlement agreement plaintiff purchased from Esther Jeanne Johnson her one-half interest in the fees earned by plaintiff individually and as a partner in the partnership of Johnson & Johnston, by transferring to her property and cash worth at least $26,010.42 more than the value of her one-half of the community property other than such fees.

V.

Plaintiff was entitled to recover said $26,010.42 out of the one-half community share of Esther Jeanne Johnson in said fees which were earned but not collected, before he received any income from the collection thereof.

Wherefore, plaintiff prays judgment against the defendant in the amount of $3,828.15 together with interest thereon from June 11, 1938, as provided by law, and for plaintiff's costs of suit, and for such other and further relief as the Court may deem meet and proper in the premises.

PHILIP D. JOHNSTON
OTIS T. GRAHAM, Jr.
Attorneys for Plaintiff [8]

(Duly Verified) [9]

EXHIBIT "A"

PROPERTY SETTLEMENT AGREEMENT

This agreement, made and entered into this 4th day of March, 1935, by and between Esther Jeanne Johnson, also known as E. Jeanne Johnson, Party of the First Part, and Todd W. Johnson, Party of the Second Part, each of said parties being residents of the City of Los Angeles, County of Los Angeles, State of California;

Witnesseth:

That, whereas, the parties to this agreement are husband and wife, and owners of certain real and personal property accumulated during their married life, the title to some of which property is held in joint tenancy and the title to some of which property is held in the name of Party of the Second Part; and there being certain debts owing by the said parties, including income tax on the income of the parties for the calendar year 1934 and 1935; and

Whereas, the Party of the First Part is about to institute an action for divorce against the Party of the Second Part, and it is the mutual desire of the parties hereto that their respective property interests be by this instrument determined and fixed forever;

Now, therefore, it is agreed:

1. That the Party of the First Part shall have as her sole and separate property that certain real property, the title to which stands in the name of

"Todd W. Johnson and E. Jeanne Johnson, husband and wife, as joint tenants", together with the buildings thereon, which property is known as 868 Birchwood Drive, Los Angeles, California, and which is more particularly described as: [10]

> Lot 43, Tract 8422, as per Maps recorded in Book 117, Pages 72 and 73 of Maps, in the office of the County Recorder of said County.

2. That the said Party of the First Part shall have as her sole and separate property that certain real property, the title to which stands in the name of "Todd W. Johnson and E. Jeanne Johnson, husband and wife, as joint tenants", together with the buildings thereon, which property is known as 9224 to 9240 West Pico, Los Angeles, California, and which is more particularly described as:

> Lots 8, 9, and 10, Tract 7580, as per Map recorded in Book 89, Pages 13 and 14 of Maps in the office of the County Recorder of said County.

3. That Party of the First Part shall have as her sole and separate property all of the furniture, furnishings, fixtures, and equipment contained in the large house located at said 868 Birchwood Drive, Los Angeles, California.

4. That Party of the First Part shall have as her sole and separate property that certain Packard Coupe Automobile, registered in the name of the Party of the Second Part.

5. That Party of the First Part shall have as

her sole and separate property all of her jewelry and personal effects.

6. That the Party of the Second Part shall pay to the Party of the First Part for her support and maintenance the sum of Five Hundred ($500.00) Dollars a month for a period of twelve (12) months, commencing as of March 1, 1935; said amount to be payable at the rate of Two Hundred Fifty ($250.00) Dollars on the first and fifteenth of each month until the total sum of Six Thousand ($6,000.00) Dollars is paid.

7. That Party of the Second Part, in consideration of making the monthly payments to Party of the First Part, shall receive all of the rents payable or accrued for a period of twelve (12) months, commencing as of March 1, 1935, upon the [11] property known as Lots 8, 9, and 10, Tract 7580. Party of the Second Part agrees to pay, prior to delinquency, all taxes and lighting assessments levied against said real property known as Lots 8, 9, and 10, Tract No. 7580, for and during the fiscal year from July 1, 1935 to and including June 30, 1936; and during the twelve months period, commencing as of March 1, 1935, Party of the Second Part agrees to keep the building and improvements on said real property fully insured in the name of the Party of the First Part at his own cost and expense; agrees to pay the cost of the maintenance and upkeep of said real property; and agrees not to do, or cause or permit to be done, or create, cause to be created, or permit to exist any act, thing, or condition with respect to

said real property which might be prejudicial to the rights and interests of Party of the First Part.

8. That Party of the Second Part shall have as his sole and separate property the real estate hereinafter described, the title to which real estate is held in the manner listed below the description of each property:

(a) That portion of Lots 21 and 22 of Tract No. 6073 as recorded in Book 63, page 13 of Maps, records of Los Angeles County, bounded and described as follows, to-wit:

Beginning at the Southwest corner of Lot 19 of the above mentioned Tract No. 6073; thence N. 84° 30′ 30″ E. 40 ft.; thence S. 21° 50′ 12″ E. 290.25 ft.; thence S. 79° 04′ 15″ E. 102.58 ft.; thence S. 32° 08′ 16″ W. 743.77 ft. to a point in the center line of Benedict Canyon Road as shown on the aforesaid map of Tract No. 6073, said point being also the beginning of a curve concave to the Southwest and having a radius of 280 ft., a radial line from said curve at said point of beginning bears S. 40° 19′ 40″ W. thence northwesterly along said curve thru an angle of 19° 08′ 05″ and an arc of 93.51 ft. to end of said curve; thence N. 21° 11′ 35″ E. 20 ft. to the most westerly corner of the above mentioned lot 22; thence N. 21° 43′ 30″ E. 653.75 ft.; thence N. 5° 13′ 25″ W. 242.34 ft. to the point of beginning of this description, containing an area of 3 acres more or less, excepting therefrom that portion of easement granted

to the City of Los Angeles by deed recorded in Book 2110 page 391 Official Records of Los Angeles County; also [12] excepting therefrom any and all portions of Benedict Canyon Road included within the above description; also excepting therefrom an easement for right of ingress and egress 22 ft. wide lying 11 ft. on either side of the following described center line, beginning at a point N. 84° 30′ 30″ E. 20 ft. from the aforesaid southwest corner of Lot 19; thence S. 5° 29′ 30″ E. 33 ft.; thence S. 28° E. 168 ft.; thence S. 2° 30′ W. 210 ft.; thence S. 56° E. 30 ft.; thence N. 64° E. 80 ft. more or less, excepting therefrom any portion of last described easement lying in the aforesaid easement as recorded in Book 2110, Page 391, Official Records.

Title to the next above described property is held in the name of "Todd W. Johnson". This is a vacant parcel of land which was received as a fee from the Ince Corporation.

(b) Lot 49, Tract 8025, as per Map recorded in Book 100, Pages 3 and 4 of Maps, records of Los Angeles County, State of California.

Title to the next above described property is held in the names of "Todd W. Johnson and Esther Jeanne Johnson, husband and wife, as joint tenants". This property is a vacant lot located in the County near the town of Pico, California.

(c) Lots 142, 161, 162, 163, 164, and 165

of Tract 5070, in the City of and County of Los Angeles, State of California, as per Map recorded in Book 57, Pages 53 and 54 of Maps in the office of the County Recorder of said County.

Title to the next above described property is held in the names of "Todd W. Johnson and E. Jeanne Johnson, his wife, as joint tenants". This property is known as 1101-1119 South La Brea, Los Angeles, California.

9. That Party of the Second Part shall have as his sole and separate property the following personal property, the title to which stands in his name:

300 shares of Citizens National Trust & Savings Bank stock;

200 shares of Dunhill International stock;

His interest in the partnership of Johnson & Johnston, attorneys-at-law;

All bank accounts standing in his name;

The Auburn Sedan Automobile;

Any fees outstanding for services performed by Party of the Second Part; and

Any other real or personal property standing in the name of either the Party of the First Part or Party of the Second Part, or in the name of both of them as joint tenants and not specifically mentioned herein as being the sole and separate property of Esther Jeanne Johnson. [13]

10. The parties hereto further agree that they

will execute quitclaim deeds of their record interests in the real estate hereinabove mentioned to confirm the record title to this agreement; and further agree that they will execute any necessary conveyances or releases of the personal property mentioned above to insure each of the parties hereto having a clear title to their personal property in accordance with this agreement. It is further agreed that this agreement may be construed as a quitclaim deed, passing title from the one party hereto to the other of the various and respective interests by this agreement agreed to be passed, and that it may be construed as a Bill of Sale, passing title from the one party hereto to the other of the various and respective interests in the personal property agreed to be passed; but, nevertheless, each of the parties hereto agrees to execute upon demand any other or further document that might be deemed necessary or convenient in order to fully and faithfully effectuate the objectives and purposes hereof.

11. Party of the Second Part further agrees to assume and pay the income tax due from both parties for the calendar years 1934 and 1935, any other debts contracted by Party of the Second Part, and any debts contracted by either or both of the parties while they were living together.

12. Party of the Second Part agrees to pay to Party of the First Part, or for her benefit, $750.00 for attorneys' fees, together with court costs incurred, or to be incurred, in connection with this agreement and in connection with any divorce action

that party of the First Part might institute against Party of the Second Part.

13. It is further agreed that this agreement shall be in lieu of all other compensation or claims of any kind in favor of either party against the other; and that henceforth neither [14] party will be responsible for the debts or obligations of the other, except as above provided.

14. It is agreed that this agreement may be incorporated in any decree that might be rendered in any divorce action between the parties hereto; and the parties hereto hereby expressly consent to any court order conforming herewith.

15. It is expressly understood and agreed that this agreement supersedes any previous agreement, oral or in writing, between the parties hereto with respects to their respective property rights; and any such previous agreements are hereby expressly abrogated, annulled, and pronounced to be of no further force or effect.

In witness whereof, we have hereunto set our hands and seals the day and year first above mentioned.

ESTHER JEANNE JOHNSON
Party of the First Part

TODD W. JOHNSON
Party of the Second Part [15]

State of California
County of Los Angeles—ss.

On this 4th day of March, 1935, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esther Jeanne Johnson, also known as E. Jeanne Johnson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MARY K. SUTER
Notary Public in and for said
State and County.

My Commission Expires July 17, 1935

State of California
County of Los Angeles—ss.

On this 4th day of March, 1935, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Todd W. Johnson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MARY K. SUTER
Notary Public in and for said
State and County.

My Commission Expires July 17, 1935. [16]

EXHIBIT "B"

CLAIM

To be filed with the Collector where assessment was made or tax paid.

Form 843 Treasury Department Internal Revenue Service Revised June 1930

Collector's Stamp (date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[ ] Refund of tax illegally collected.

[ ] Refund of Amount Paid for stamps unused, or used in error or excess.

[ ] Abatement of tax assessed (not applicable to estate or income taxes).

State of California
County of Los Angeles—ss.

[Type or Print]

Name of taxpayer or purchaser of stamps—Todd W. Johnson

Business address—433 South Spring Street, Los Angeles, California

Residence—1280 Benedict Canyon Drive, Los Angeles, California

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Sixth California

Exhibit "B" (Continued)

2. Period (if for income tax, make separate form for each taxable year) from—January 1, 1935, to December 31, 1935

3. Character of assessment or tax—Income Tax

4. Amount of assessment, $10,940.84; dates of payment $7,821.89 paid and credited 6/11/38; $3118.95 paid as follows: $779.74 on 2/6/36; $779.74 on 6/4/36; $779.74 on 9/14/36; and $779.73 on 12/10/36.

5. Date stamps were purchased from the Government—

6. Amount to be refunded—$7,148.11

7. Amount to be abated (not applicable to income or estate taxes) $—

8. The time within which this claim may be legally filed expires, under Section— of the Revenue Act of 19—, on June 11, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached rider which is made a part hereof by reference.

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this — day of — 193 (signature of officer administering oath)

(Title)

Signed.....

(See instructions on reverse side) [17]

Exhibit "B" (Continued)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Claim No.....

Character of assessment and period covered, List, Year, Month, Account No. or Page, Line, Amount assessed $..... Total $.....

Paid, Abated, or Credited, Date, Amount $..... Total, $..... Claim No.....

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued, Kind, Number, Denomination, Date of sale or issue, Amount $.....

If special tax stamp, state: Serial number, Period commencing—

Collector of Internal Revenue (District)

Committee on claims

Amount claimed $.....

Amount allowed $.....

Amount rejected $.....

Claim examined by— Claim approved by— Chief of Division.

Instructions

1. The claim must be set forth in detail and under oath each ground upon which it is made, and facts sufficient to appraise the Commissioner of the exact basis thereof.

Exhibit "B" (Continued)

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Exhibit "B" (Continued)

The Commissioner of Internal Revenue erroneously determined that taxpayer had the following net income for the calendar year 1935:			$54,860.13
1. The Commissioner of Internal Revenue erroneously determined that taxpayer was taxable on all of the following fees whereas he was only taxable on one-half thereof:			
Viber Company legal work	$ 112.00		
Ray Tracy Income tax work	55.00		
Wm. G. Kerckhoff Estate Tax case	31,791.67		
Total Fees	31,958.57		
One-half		$15,979.28	
2. The Commissioner erroneously determined that taxpayer's taxable distributable share of the earnings of Johnson & Johnston, a partnership, was $23,912.41 whereas his correct taxable share was $13,881.27, a difference of		10,031.14	
Total excess income as determined by the Commissioner			26,010.42
Correct Net Income			$28,849.71
Tax liability as determined by Commissioner		10,940.84	
Correct tax liability		3,792.73	
Overassessment		$ 7,148.11	

In the agreement signed by taxpayer on April 20, 1938, waiving the restrictions on assessing the tax determined by Commissioner the taxpayer agreed as follows:

Exhibit "B" (Continued)

"2. The taxpayer has not agreed not to file a claim for refund, but should he file a claim for refund or court action for recovery of tax paid by him for the year 1935 on income held to be his separate property and not community property, that any recovery on the community property basis shall be limited to the net amount after giving effect to the resulting tax due from his wife and barred from assessment by the statute of limitations."

Accordingly, the taxpayer is entitled to a refund of $7,148.11, plus interest as allowed by law on his payments of tax and interest, less the [18] amount of tax which should have been paid by taxpayer's ex-wife, Esther Jeanne Johnson (now Haskell).

DISCUSSION OF FACTS AND LAW INVOLVED

1. The Viber Company and Tracy fees were for work completed long prior to January 1, 1935, but they were unable to pay the fees in full and paid in installments.

The Wm. G. Kerckhoff Estate tax fee was for a case completed prior to March 4, 1935, the date taxpayer entered into a property settlement with his then wife, Esther Jeanne Johnson. A total fee of $42,398.93 had been fixed and agreed to on this case prior to March 4, 1935. However, payment was not demanded nor received until after March 4, 1935.

Exhibit "B" (Continued)

Todd W. Johnson, the taxpayer, and Phillip D. Johnston, on May 26, 1933, entered into a partnership agreement. At that time the two partners surveyed the work done and to be done on this case and agreed that the case was 75% completed and accordingly it was agreed that 75% of the ultimate fee would be paid to Todd W. Johnson and 25% of the fee would be paid to Johnson and Johnston. When the fee was collected 75% or $31,791.67 was received by Todd W. Johnson and 25% or $10,597.26 was received by the partnership of Johnson and Johnston.

On March 4, 1935, the sum of $31,791.67 represented an account receivable due Todd W. Johnson and the sum of $10,597.26 represented an account receivable due Johnson & Johnston. Inasmuch as these accounts receivable were for services performed between 1929 and March 4, 1935, while taxpayer was married to Esther Jeanne Johnson, they were property and the community property of taxpayer and said Esther Jeanne Johnson.

Any fees earned by Todd W. Johnson prior to the property settlement agreement of March 4, 1935 were clearly the community property of Todd W. Johnson and Esther Jeanne Johnson. If no property settlement had been agreed to and the parties were finally divorced, the said Esther Jeanne Johnson would have been entitled to receive her one-half community interest in all fees earned prior to the final divorce.

Exhibit "B" (Continued)

To illustrate this point reference is made to the case of King v. Commissioner, 26 B.T.A. 1158, 13 A.F.T.R. 747. In this case the lawyer entered into a contingent fee contract with a client and thereafter the wife died. At her death a favorable judgment in the lower court had been obtained by such lawyer, but the case had been appealed. After her death a settlement was made whereby the lawyer's client was paid a sum somewhat less than the judgment which had been obtained in the lower court. His contingent fee was of course also collected after the death of his wife. In filing his income tax return, the lawyer included only one-half of this contingent fee and claimed that his wife's [19] estate was taxable on the other one-half. The Commissioner held that the lawyer was taxable on all of this contingent fee, and that the wife's estate was taxable on none of it.

The Court in a well reasoned opinion held that the husband was taxable only on one-half of this fee and used the following language:

> "The fact that the marital relationship was dissolved by death before the condition was fully performed does not affect the property interest in the fee when it was received because * * * it is the time of the inception of the initial right which determined the status of the property * * *"

Manifestly, the dissolution of the marital relationship either by divorce, or death, could not

Exhibit "B" (Continued)

change the status or property interest in fees already earned when such relationship was dissolved. Therefore it is quite clear that in the absence of any specific agreement a divorced wife would retain her one-half community interest in fees earned prior to a divorce.

From the above it is quite clear that, despite the divorce, had there been no community property settlement one-half of all fees earned prior to March 4, 1935 would have been the community property of Todd W. Johnson and Esther Jeanne Johnson, and said Todd W. Johnson would have been taxable only on one-half thereof, because said Esther Jeanne Johnson would have received one-half thereof as her part of the community property. It is also clear that a husband and wife may agree between themselves that all present or future earnings of either spouse shall be the separate property of the particular spouse earning the same. If the particular spouse giving up his or her one-half community share of such earnings does so without consideration the lower court and Board decisions seem to erroneously hold that such earnings become the separate property of the particular spouse earning the same and he or she is taxable on 100% thereof. H. G. Ferguson v. Commissioner, 34 B.T.A. 522. The claim is made herein that until a final divorce decree is entered, said income is taxable one-half to the husband and one-half to the wife.

Exhibit "B" (Continued)

Furthermore, under the laws of California a husband and wife may enter into any valid contract with each other including a purchase or sale contract. California Civil Code, Section 158; Ran v. Ran, 100 Cal. 276, 34 Pac. 775; Smith v. Smith, 47 Cal. App. 650, 191 Pac. 60; Gray v. Perlis, 76 Cal. App. 511, 245 Pac. 212; Rayburn v. Rayburn, 54 Cal. App. 69, 200 Pac. 1064; Grant v. Commissioner, 29 B.T.A. 760.

Inasmuch as a husband can enter into any valid contract with his wife, Todd W. Johnson could and did agree to purchase from Esther Jeanne Johnson all of her community one-half interest in the fees earned prior to March 4, 1935. Had he paid her a specific sum in cash for her community one-half interest in such fees the matter would appear quite [20] simple. In the case of Helvering v. Smith, 90 Fed. (2d) 590, 199 A.F.T.R. 889, the retiring partner in a law partnership was paid by the remaining partners a lump sum of $125,000.00 for his interest in the legal fees earned prior to his retirement. The court rejected the theory that the transaction was strictly a sale of partnership interest, but held that it was a present payment for "income already earned but not reported by a cash receipts taxpayer until collected from the firm's clients. As all such collections would be taxable as ordinary income the replacement of such future income with the cash payment was held to result in present taxation in the same manner."

Exhibit "B" (Continued)

As stated in Helvering v. Smith, Supra, except for this purchase and release, Todd W. Johnson would have "turned over to" her, her "existing interest in earnings already made." "The commuted payment merely replaced the future income with cash."

On the facts in the Smith case it is believed that anyone would concede that the remaining partners were entitled to recover the $125,000.00 paid to Smith, out of his former percentage of the fees, before the remaining partners would receive any income from the collection of his former share of the fees. See Hallowell, et al., v. Commissioner, decided January 5, 1939, 39 B.T.A. 7, Para. 6.103, Prentice Hall B.T.A. decisions for 1939. The principle of this case and the other mentioned above when applied to the present situation would mean that to the extent that Todd W. Johnson paid Esther Jeanne Johnson in cash and property for her one-half community interest in such fees, that he is entitled to recover such cost before he receives any income by reason of the collection of her community one-half share of such fees.

In making such property settlement of March 4, 1935, Todd W. Johnson had a number of discussions with the attorneys for Mrs. Johnson during which the community property then owned and the legal fees earned but not paid were considered at great length. The amount of such fees earned but not collected received careful consideration and es-

Exhibit "B" (Continued)

timates were made by Mr. Johnson and the attorneys as to the probable amount thereof. Mrs. Johnson was entitled to receive an undivided one-half interest in all property owned plus her one-half share in fees earned but not collected. She preferred to receive a lump sum settlement in property and cash so that she and Mr. Johnson would not own interests in the same property. When the settlement was actually agreed to, she received considerably more than one-half of the community real and personal property other than such fees, and also received $6,000.00 in cash. Both Mr. Johnson and the attorneys for Mrs. Johnson considered that the excess property and cash received by her was in lieu of and in payment for her share in such fees earned but not collected.

Todd W. Johnson, the taxpayer, claims that he is not taxable on any part of the $27,333.38 collected by him in the year 1935 which was earned prior to March 4, 1935, but represented the community one-half share of Mrs. Johnson in such fees because of the fact that he paid the [21] full value in property or cash in such property settlement. A case illustrating this point is that of McWilliams, 15 B.T.A. 329, where it was held that where a taxpayer purchased the interest of his partner in the profits earned during the current year, that such profits were not taxable income to the taxpayer as they were acquired in a capital transaction. Also see Bull v. United States, 295 U.S. 247, 55 Sup. Crt. 695, 15 A.F.T.R. 1069.

Exhibit "B" (Continued)

2. The community one-half interest of Mrs. Johnson is the sum of $10,031.14 in the firm of Johnson and Johnston is arrived at as follows:

Bartholomae Oil Corp. fee	$ 2,957.50
John B. Newman Estate fee	1,500.00
John Gilbert fee	1,000.00
Gertrude Titus-Reeves Estate fee	2,700.35
Crosby Productions Inc. fee	300.00
Aztec Brewing Co. fee	1,000.00
Carver Investment Co. fee	340.86
Will E. Keller Estate fee	1,500.00
L. M. McDonald fee	795.15
Kerckhoff Estate Tax fee	8,477.81
Kerckhoff County Tax case fee	6,188.04
Total	$26,759.71
75% of Todd W. Johnson and Esther Jeanne Johnson	$20,062.28

The Bartholomae Oil Company fee was in connection with transferee income taxes completed July 13, 1933. The corporation was not in a financial position to pay the total fee when the work was finished and a balance of $2,957.50 was collected during the year 1935.

The John B. Newman Estate fee involved an estate tax case completed October 14, 1932. This estate was financially unable to pay the total fee when the work was completed and $1,500.00 was received on this fee in the year 1935.

The John Gilbert fee represented income tax work completed in March, 1934. We neglected to send out a bill for this fee of $1,000.00 until 1935, at which time it was paid.

Exhibit "B" (Continued)

The Gertrude Titus-Reeves estate fee of $2,700.35 involved an estate tax net which was completed during November of 1934. The fee was billed on January 7, 1935 and paid on January 11, 1935.

The Crosby Productions Inc. fee of $300.00 represents a bookkeeping charge for this corporation for October, November, and December, [22] 1934. These books were kept by an accountant in our office and bills were always sent in the month following the completion of a full quarter's work.

The Aztec Brewing Company fee of $1,000.00 was for income tax work during the year 1933, to October 31, 1934.

The Carver Investment Company fee of $384.86 involved a tax case which was completed November 5, 1934.

The Will E. Keller Estate fee of $1,500.00 represented a payment on account of work done prior to March 4, 1935. The total amount due for work done prior to March 4, 1935, was in excess of $1,500.00 but this payment was received on account during the year.

The L. M. McDonald fee involved income tax work completed in 1935. Our record shows that 35½ hours' work was done prior to March 4, 1935, and eight hours' work was done after that time. The work was more than 80% complete as of March 4, 1935, and the total fee received was $981.44. I have treated 80% of the fee, $785.15, as having been earned prior to March 4, 1935.

Exhibit "B" (Continued)

The Kerckhoff estate tax fee of $10,597.26 represents 25% of the total fee heretofore mentioned, the said 75% having been paid to Todd W. Johnson for work done prior to May 26, 1933. More than 80% of the remaining work to be done on this case was completed prior to March 4, 1935. However, I have treated only 80%, or $8,477.81, of the fee as having been earned prior to that time.

The Kerckhoff county tax case involved a total fee of $9,576.51 of which the amount of $6,188.04 was collected in 1935, and $3,488.47 in February of 1936. The total time spent on this case was 400½ hours, of which 305½ hours had been spent prior to March 4, 1935. Inasmuch as more than $6,188.04 had been earned prior to March 4, 1935, I have treated the entire amount collected as having been earned prior to that time.

The reasons why the community one-half interest of Esther Jeanne Johnson in the fees of Johnson and Johnston are not taxable to Todd W. Johnson are the same as mentioned with reference to the individual fees of Todd W. Johnson. Such reasons will not be repeated here but are hereby incorporated by reference. [23]

In addition to the above errors the Commissioner added to the partnership income of Todd W. Johnson $775.40 by disallowing $1,020.54 Club dues paid for the partners. The item is made up as follows:

Club dues and expenses of Philip D. Johnston at Bel Air Country Club	$ 587.21

Exhibit "B" (Continued)

Club dues and expenses of Todd W. Johnson at Los Angeles Country Club	419.42
Club dues and expenses of Todd W. Johnson at Stock Exchange Club	13.91
Total	$ 1,020.54

All of these payments represented ordinary and necessary business expense of the partnership, and the net income of Todd W. Johnson should be reduced by $775.40. Furthermore, should the Commissioner be sustained in disallowing these expenses, the income of Todd W. Johnson should have been increased only by $433.33, the expense paid for him and not by $775.40 which latter figure represents 75% of the expenses paid for both partners. [24]

EXHIBIT "C"

TREASURY DEPARTMENT

Washington

Sept. 21, 1940

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
IT:CL:CC: 4-CCP

Mr. Todd W. Johnson,
433 S. Spring Street,
Los Angeles, California.

In re: Claim for refund of $7,148.11.

For the year 1935.

Sir:

Reference is made to the revenue agent's report upon an investigation of your tax liability dated July 9, 1940, a copy of which was forwarded you, wherein you were informed that the claim for refund indicated above will be disallowed.

In accordance with the provisions of existing internal revenue law, notice is hereby given of the disallowance of your claim in full.

Respectfully,
GUY T. HELVERING
Commissioner.

By G. MOONEY
Deputy Commissioner.

[Endorsed]: Filed Oct. 1, 1940. [25]

[Title of District Court and Cause.]

DEFENDANT'S ANSWER

ANSWER TO FIRST CAUSE OF ACTION

Comes now the defendant in above-entitled action and in answer to the first cause of action of plaintiff's complaint herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof.

IV.

Admits the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that defendant denies that the Commissioner's determination, referred to in said Paragraph, was erroneous. [26]

VI.

Denies the allegations contained in Paragraph VI thereof, and in that connection alleges that plaintiff had a net taxable income for the year 1935 amounting to $54,860.13.

VII.

Denies the allegations contained in Paragraph VII thereof.

VIII.

States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VIII thereof, but specifically denies that only one-half of said fees and accounts receivable was taxable to plaintiff.

IX.

Denies the allegations contained in Paragraph IX thereof; except that defendant admits that $10,031.14 is one-half of $20,062.28.

X.

Admits the allegations contained in Paragraph X thereof, except that defendant states that it is without information sufficient to form a belief as to the truth of the averment concerning the terms of said partnership agreement, and the averment concerning the identity and amounts of fees that were paid directly to plaintiff.

XI.

Admits the allegations contained in Paragraph XI thereof.

XII.

Admits the allegations contained in Paragraph XII thereof and alleges that said property settlement [27] agreement was dated and executed by the parties on the fourth day of March, 1935.

XIII.

Admits the allegations contained in Paragraph XIII thereof, except that defendant denies that the determinations of the Commissioner in said Paragraph referred to, were erroneous; and denies that plaintiff was taxable only on one-half of said income.

XIV.

Admits the allegations contained in Paragraph XIV thereof.

XV.

Admits the allegations contained in Paragraph XV thereof.

XVI.

States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVI thereof.

XVII.

Denies the allegations contained in Paragraph XVII thereof, except that defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averment that plaintiff had a seventy-five per cent interest in the net earnings of said partnership, and the averment that said club dues and said expenses in any amount were spent in entertaining clients and/or prospective clients.

XVIII.

States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVIII thereof. [28]

XIX.

Admits the allegations contained in Paragraph XIX thereof.

XX.

Denies the allegations contained in Paragraph XX thereof, except that defendant admits that no part of said sum has been repaid or refunded to plaintiff, or to anyone else on his behalf.

ANSWER TO SECOND CAUSE OF ACTION

In answer to the second cause of action of plaintiff's complaint, defendant admits, denies and alleges:

I.

In answer to Paragraph I thereof, defendant by reference incorporates herein its answers to plaintiff's first cause of action and makes said answers a part hereof the same as though expressly set forth herein.

II.

States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II thereof. Defendant, however, denies the materiality and

competency of the allegations contained in said Paragraph and in that connection alleges the fact to be that the terms of said property settlement agreement are certain and unambiguous.

III.

States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III thereof. [29]

IV.

Denies the allegations contained in Paragraph IV thereof.

V.

Denies the allegations contained in Paragraph V thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Asst. U. S. Attorney.
ARMOND MONROE JEWELL,
Asst. U. S. Attorney.
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.
By: E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 4, 1941. [30]

[Title of District Court and Cause.]

OPINION

Todd W. Johnson, Esquire of Los Angeles, California, in propria persona, Plaintiff.

Edward H. Mitchell, Assistant United States Attorney, of Los Angeles, California, for Defendant.

J. F. T. O'Connor, Judge.

This is an action for the recovery of $7,821.89, including interest thereon, which was allegedly illegally assessed against and collected from Todd W. Johnson, the plaintiff, by the United States Department of Internal Revenue, as income tax; and also to allow a certain deduction for business expenses. The controversy is predicated upon the following facts:

During 1921 the plaintiff, Todd W. Johnson, married Esther Jeanne Johnson, and thereafter the plaintiff and his then wife accumulated considerable property, tangible and intangible, in the aggregate amount of $131,839.51. Of this $131,839.51, the sum of $77,220.44 was attributable to the wife's contribution to the community, and $54,619.07 was attributable to the contribution of the plaintiff to the community assets. All of the said property was held either as community property or under joint tenancy.

On January 1, 1935, the plaintiff and his then wife separated and this separation subsequently

resulted in the entry of a final decree of divorce between Todd W. Johnson and Esther Jeanne Johnson on April 2, 1936, the interlocutory decree of divorce having been entered on April 1, 1935. Prior to the divorce, viz. on March 4, 1935, a Property Settlement Agreement had been entered into between the plaintiff and his then wife, Esther Jeanne Johnson, whereby a dissolution of the community character of the property was consummated and the property was divided as is hereinafter indicated: by virtue of the said agreement Esther Jeanne Johnson was allotted miscellaneous properties and cash in the amount of $65,919.75, representing one-half of the entire assets, and Todd W. Johnson was given an equal sum of $65,919.75 as his proportionate share. In the $65,919.75 comprising the plaintiff's one-half interest were included certain accounts receivable amounting to $52,028.45. Said accounts consisted of attorney's fees earned from the plaintiff's practice as an attorney at law, which were collected between March 4, 1935 and December 31, 1935. The income tax on the amounts collected from these accounts receivable is the principal basis of this litigation.

It is the contention of the Government, and conceded by the plaintiff [31] in his closing reply brief, that the transaction between himself and Mrs. Johnson constituted a division or partition of the community and joint tenancy assets, and not a sale or exchange of properties. For this reason the theory of a sale or exchange of properties will not

be further noted. The gift theory advanced by the plaintiff was eliminated from the record by the court at the time of trial.

The plaintiff was a member of the law firm of Johnson and Johnston, wherein Mr. Johnson had a 75% interest, and his partner a 25% interest in the net earnings of the partnership. During the year 1935, $1020.54 was disbursed by the partners, purportedly consisting of necessary club dues and expenses, for the purposes of securing and entertaining prospective clients and otherwise building up the business. By reason thereof the plaintiff claims a deduction of $775.40, which amount represents a 75% interest in the total partnership expenditures for the above club dues and expenses. The Government contends that this deduction should not be allowed because the expenses were not ordinary and necessary and did not directly relate to the partnership business, but were merely for the personal pleasure of the plaintiff.

The two questions involved under the facts are propounded by the plaintiff in his opening brief:

> (1) "What part, if any, of the fees earned by plaintiff as an attorney at law and constituting accounts receivable on March 4, 1935, when a property settlement agreement was executed by plaintiff and his then wife, and which were collected by plaintiff between March 4, 1935, and December 31, 1935, was taxable to plaintiff and what part, if any, was taxable to his then wife?"

(2) "Is plaintiff entitled to deduct as a business expense certain club dues and expenses?"

The solution of the first question requires a determination of the legal effect of the property settlement agreement, and the status of the accounts receivable subsequent to its execution.

Section 158 of the California Civil Code provides in part:

> "Either husband or wife may enter into any engagement or transaction with the other * * * respecting property, which either might if unmarried."

Section 159 also provides that:

> "A husband and wife cannot by contract with each other, alter their legal relations except as to property." [32]

Under these sections the spouses are enabled, by contract, to convert community property into separate property, and vice versa. 12 New Cal. Dig. (McKinney) 485. In consequence of the partition the community assets became the "sole and separate" property of the respective parties by the very terms of the agreement. The legal effect of the transaction was to dissolve the community and joint tenancy character of the property, and transmute the same into separate property. Therefore, the accounts receivable, in the amount of $52,028.45 became the separate property of the plaintiff and were taxable as such when collected, inasmuch as the income tax was levied on a cash basis. The plaintiff strenuously urges that he is taxable, in

any event, for only $17,166.46; this being the difference between $34,861.99 or cost basis to the community placed upon the accounts receivable and the market value of $52,028.45. This contention would be tenable if the subject matter to be taxed were derived from a source which had already been taxed and the property subsequently disposed of at a profit. But here, the accounts receivable were original income and a capital transaction was not involved. The plaintiff is denied recovery.

Answering the plaintiff's second question concerning a deduction of certain club dues as a business expense, the law seems to be well settled. Section 23 of the Internal Revenue Code; 26 U. S. C. A. sec. 23 (a)(1), provides: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *," shall be allowed as deductions in computing net income. Among the many cases construing the pertinent provisions of this statute only a few will be cited. In Louis Boehm, 35 B. T. A. 1106, the Board said:

> "It is noted that in cases where expenditures of a social nature have been held to be deductible business expenses, proof was presented to show that such expenditures had a direct relation to the conduct of a business or the business benefits expected * * *" E. E. Dickinson, 8 B. T. A. 722; Wade H. Ellis, 15 B. T. A. 1075; Aff., 50 F. (2d) 343; Blackner v. Commissioner, 70 F. (2d) 255.

Although most of the cases cited in the above quotation denied the requested deduction, yet the principle is the same. Whether or not certain expenditures are deductible as "ordinary and necessary" expense in a particular business, is a question of fact. Willcuts v. Minnesota Tribune Co., 103 F. (2d) 947. [33]

The position of the plaintiff with respect to the necessity of incurring the club dues and expenses in question is disclosed by his uncontradicted testimony. He stated:

> "When I left the Government service in 1929, * * * I had only one piece of business, which was to appraise a large estate for federal estate tax * * * purposes. Along the first part of 1930 I had fairly well finished the appraisement and found myself in the position of having just the one client and no others. I endeavored to contact attorneys and bankers with whom I had casual acquaintances through my work in the Government service, and found that I either couldn't get an appointment with them or if I did get one, they didn't seem to have any particular interest in what I had to talk about, which was my qualifications for assisting them in tax matters. It became apparent to me that I would have to find some means of obtaining their interest by geting better acquainted with them. I found that at least 50% or more of the attorneys and bankers with whom I wished to make contact were

> members of the Los Angeles Country Club. I therefore determined that I would join that club * * * I did this, and from that time until after 1935, I believe that every time I went out to the club I had some particular idea in mind as to whom * * * I would attempt to become friendly with while I was there. I believe I can truthfully say that what success I have had in the legal business has been largely due to my joining the country club."

The plaintiff stated he did not enjoy playing golf; that green fees and food, paid for his prospective clients, were the largest item on his monthly club bill. Plaintiff testified that he did not enjoy golf because he felt he should be working at the office. At the time of the formation of the partnership it was agreed that the club dues and expenses were to be charged as business expenses and were so charged on the books. The facts disclose that the main purpose of the plaintiff in joining the clubs was to obtain business and the plaintiff gave many names of clients secured by his partner and himself in this manner. Large fees were collected from the contacts made at the club. Several clients would not come to his office. The Government demanded and received large income taxes on the fees collected by the plaintiff as a direct result of plaintiff's expenditure in club dues, and the Government cannot refuse to allow plaintiff a deduction as a business expense of the money which produced the business. To rule otherwise would

revive the fable of the goose and the golden eggs.

The evidence also shows that when plaintiff's partner, Mr. Johnston, joined the Bel-Air Country Club for the same purpose, three estates were obtained through his contacts from which fees aggregated in excess of $50,000. The record [34] further indicates that during 1935, due to insufficient help, the plaintiff worked day and night, and frequently on Saturday afternoons and Sundays, and only visited the country club when he felt it absolutely necessary. His membership was "purely from a business standpoint", and was discontinued whenever this method of obtaining business became unprofitable. Without further alluding to the evidence it will suffice to say that the expense incurred by the membership of the plaintiff and his partner in the various clubs, directly contributed to the success of the firm. Under the facts in this particular case, the plaintiff is allowed a deduction as a business expense the amount paid for club dues.

Dated this 29th day of November, 1941.

J. F. T. O'CONNOR,
United States District Judge.

[Endorsed]: Filed Nov. 29, 1941. [35]

[Title of District Court and Cause.]

SPECIAL FINDINGS AND CONCLUSIONS OF LAW PROPOSED AND REQUESTED BY PLAINTIFF

I.

The Court adopts as it Findings of Fact, in part, the facts stipulated at the trial by the parties and introduced as evidence as plaintiff's Exhibit 4, the same as if set forth herein in full.

II.

In the year 1921 the plaintiff married Esther Jeanne Johnson. From 1925 until January 1, 1935, they lived together as husband and wife in the State of California. They separated permanently on the last named date.

III.

Thereafter, and on the 4th day of March, 1935, they executed a written agreement, bearing date the said day, a true copy of which is attached to plaintiff's complaint and there marked Exhibit "A". In and by such agreement the property rights and interests of the parties were finally and forever settled, the obligations of the respective spouses, growing out of their marriage relation, were discharged, and all claims of every kind of each against the other were finally released. [36]

IV.

All of the then existing property, real and personal, referred to in said agreement was acquired

after July 29, 1927, and was traceable and attributable to the toil and talent of plaintiff alone while the spouses resided together in California. Each parcel of real estate described in said agreement as standing in the names of the spouses as "joint tenants," was, on March 4, 1935, the separate property of each to the extent of undivided halves thereof. All of the balance of the real and personal property described in the agreement, including the accounts receivable representing legal fees earned but not collected and the community 75% share of the accounts receivable of the law firm of Johnson & Johnston, was. on March 4, 1935, "community" property of the California type acquired after July 29, 1927.

V.

In entering into said contract of March 4, 1935, each of the spouses, insofar as the property therein described is concerned, intended to and did thereby so dispose of and transform such property that each thereafter would own, as his and her separate property, specific portions thereof in kind as nearly equal in value as possible.

VI.

On March 5, 1935, Esther Jeanne Johnson filed a suit against the plaintiff in the Superior Court of Los Angeles County, California, praying for a divorce on the grounds of cruelty. On April 1, 1935, said court entered an interlocutory decree of divorce in said action, and its final decree therein

on the 2nd day of April, 1936, completely and finally dissolving the bonds of matrimony between the spouses. The interlocutory decree approved said agreement and ordered that the defendant, plaintiff herein, pay to the plaintiff, wife, "as alimony for her support and maintenance" the sum of $500 a month for twelve months. The latter provision was incorporated in the final decree by reference. A certified copy of the interlocutory decree was personally served upon the defendant, plaintiff in this action, on the 3rd day of April, 1935.

VII.

The agreement by plaintiff to pay and his payment of $500 per month [37] for a period of one year, or a total of $6,000, to his wife, reduced by his collection of rent from the Pico Street property during the same period, was in full satisfaction of and constituted a complete discharge of the rights, if any, which his wife had to receive support, maintenance or alimony from plaintiff. The net rentals from said Pico Street property, collected and received by plaintiff as provided in Article 7 of said property settlement agreement, were $2,179.74. Said net rentals were an offset to and reduction in the amount of alimony which plaintiff agreed to and did pay his said wife as set forth above.

VIII.

The transaction evidenced by said agreement of March 4, 1935, did not constitute reciprocal "sales,"

"exchanges," or "dispositions" of or "dealings in" properties by or between the spouses. It did not constitute reciprocal gifts of property by the spouses, one to the other. Neither party, at the time of the transaction, entertained toward the other a donative intent. The transaction evidenced by said agreement was, insofar as it related to property, in the nature of a division or partition thereof in kind. Insofar as it related to the division in kind of real estate held in joint tenancy, each spouse "conveyed" to the other his or her undivided separate right, title and interest therein, as provided by the agreement, for the purpose of effectuating such division in kind. Insofar as it related to community property, real and personal, each spouse so disposed of or transformed his or her one-half interest in the particular property involved into the separate property of the particular spouse receiving the same.

IX.

The value of the separate and undivided half interest of each spouse in the real estate held by the spouses in joint tenancy was, at the time of the agreement, exactly one-half of the value of the whole property; the value of the undivided one-half interest of each spouse in said community properties, at the time of the agreement, was also exactly one-half of the value of the whole property.

[38]

X.

Following are the market values, as of March 4, 1935, of the joint tenancy and community properties disposed of and transformed by said property settlement into the separate properties of the respective spouses:

Parcels	Values
1. Real estate described in Article 1 of the agreement	$35,000.00
2. Real estate described in Article 2 of the agreement	25,000.00
3. Furniture, etc., described in Article 3 thereof	10,000.00
4. Automobile described in Article 4 thereof	2,000.00
5. Jewelry, etc., described in Article 5 thereof	2,000.00
6. Real estate described in Article 8(a) thereof	1,500.00
7. Real estate described in Article 8(b) thereof	500.00
8. Real estate described in Article 8(c) thereof	$30,000.00
9. 300 shares of Citizens Bank stock (Article 9)	6,000.00
10. 200 shares of Dunhill stock (Article 9)	1,000.00
11. Auburn automobile (Article 9)	1,000.00
12. Cash in bank accounts (Article 9)	6,350.96
13. Accounts receivable owned by the community, representing legal fees earned but not collected	31,958.67
14. Community 75% of accounts receivable of the partnership of Johnson & Johnston	20,069.78
Total market value of joint and community assets	$172,379.41

XI.

The following tabulation sets forth the total original cost of said joint tenancy and community assets set forth in paragraph X above:

Parcels		Cost
1.	Real estate described in Article 1 of the agreement	$39,284.61
2.	Real estate described in Article 2 of the agreement	19,496.50
3.	Furniture, etc., described in Article 3 thereof	15,000.00
4.	Automobile described in Article 4 thereof	2,180.17
5.	Jewelry, etc., described in Article 5 thereof	3,000.00
6.	Real estate described in Article 8(a) thereof	3,000.00
		[39]
7.	Real estate described in Article 8(b) thereof	1,845.28
8.	Real estate described in Article 8(c) thereof	31,355.08
9.	300 shares of Citizens Bank stock (Article 9)	8,095.25
10.	200 shares of Dunhill stock (Article 9)	4,322.50
11.	Auburn automobile (Article 9)	1,500.00
12.	Cash in bank accounts (Article 9)	6,350.96
13.	Accounts receivable owned by the community, representing legal fees earned but not collected	Nil
14.	Community 75% of accounts receivable of the partnership of Johnson & Johnston	Nil
	Total original cost of joint tenancy and community property	$135,430.35

XII.

The total depreciation taken for income tax purposes upon said parcels two and four above, prior to March 4, 1935, amounted to $1,740.84. The total depreciation taken for income tax purposes upon said parcels eight and eleven above before March 4, 1935, amounted to $1,850.00.

XIII.

After its execution and pursuant to the provisions of Article 10 of said agreement, plaintiff made the following expenditures, to-wit:

(1) 1934 tax upon the one-half of the community income of plaintiff	$ 5,082.78
(2) 1934 tax upon the one-half of the community income of plaintiff's wife	5,082.78
(3) 1935 income tax returned in the name of plaintiff	3,118.95
(4) 1935 income tax returned in the name of plaintiff's wife	3,118.95

There were no other debts or liabilities due from or owing by the spouses or the community on March 4, 1935.

XIV.

The cost or basis of each spouse of his or her one-half interest in [40] said joint tenancy and community properties was $65,919.75, representing one-half of $135,430.35, total cost of all of said properties, or $67,715.17, less one-half of the total depreciation sustained and allowed of $3,590.84, or $1,795.42. The cost of each spouse of his or her one-half interest on March 4, 1935, in each particular property owned by the community or by the two spouses jointly was exactly one-half of the total cost to the community or to the two spouses of said particular property.

XV.

Plaintiff's wife received properties, under said property settlement which had an original cost to the spouses, less depreciation, of $77,220.84, and which had a market value on March 4, 1935, of $74,000.00. In addition plaintiff assumed and paid her 1934 income tax of $5,082.78 and the 1935 income tax shown on her return in the sum of $3,118.95.

XVI.

Plaintiff received cash and tangible property which had an original cost to the spouses of $54,619.07 and which had a market value on March 4, 1935, of $46,350.96. Plaintiff also received community accounts receivable, representing legal fees earned but not collected, which had no cost but which had a face value and a market value of $31,958.67. Plaintiff also received the community 75% in the accounts receivable of the law firm of Johnson & Johnston, which had no cost but which had a face value and a market value of $20,069.78. Plaintiff received tangible and intangible properties, including said accounts receivable in the total amount of $52,028.45, having a total cost to the spouses of $54,619.07 and having a market value on March 4, 1935, of $98,379.41. Plaintiff also assumed and paid his wife's 1934 income tax of $5,082.78 and the 1935 income tax shown on his wife's return in the sum of $3,118.95.

XVII.

In the property settlement, plaintiff acquired the one-half interest, having a face and market value of $26,014.23 in certain accounts receivable, representing legal fees earned but not collected, and the one-half interest, having a fair market value of $23,175.48, in other joint and community property, [41] which his wife formerly owned. Plaintiff in the property settlement acquired property having a total fair market value of $49,189.71 which formerly belonged to his wife.

XVIII.

In the property settlement, plaintiff transferred or gave up to his wife his one-half interest in certain joint and community property which had a cost to him of $38,610.41. Plaintiff had already paid an income tax on the $38,610.41 used to purchase his half interest in said property. Also plaintiff, in the property settlement assumed and later paid his wife's 1934 income tax of $5,082.78 and the income tax of $3,118.95 shown on her return. Plaintiff, in the property settlement, gave up property which had cost him $38,610.41, on which he had already paid an income tax, and assumed his wife's debts of $8,201.73, or a total of $46,812.14.

XIX.

In the property settlement, plaintiff's wife acquired the one-half interest, having a market value of $37,000.00, which plaintiff formerly owned in certain joint and community property and also her 1934 and 1935 income taxes in the amount of $8,201.73 were assumed and paid by plaintiff, making a total of $45,201.73 acquired by her in the property settlement.

XX.

In the property settlement, plaintiff's wife transferred or gave up to plaintiff her one-half interest in certain accounts receivable, which had cost her nothing, and also her one-half interest in certain other joint and community property which had cost her $27,309.53. She had already paid an in-

come tax on the $27,309.53 which was used to purchase her half interest in said properties.

XXI.

In the year 1935, the law firm of Johnson & Johnston expended the total sum of $1,020.54 in payment of club dues and club expenses contracted in said year by the two members of the firm for the purpose of securing and entertaining prospective clients and otherwise building up the firm business. [42]

The only purpose of using the club facilities in the taxable year was to obtain legal business; and large legal fees were received by the firm from contacts made in the year 1935 at these clubs. The clubs were used by the partners in the taxable year solely for business reasons and not for social purposes. The cost of said 1935 club activities of the members was both ordinary and necessary to the operation in 1935 of the firm business.

CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF

From the foregoing facts the Court concludes:

I.

Those of the foregoing findings which determine mixed questions of law and fact are adopted as Conclusions of Law the same as though here set forth in full.

II.

The legal effect of the property settlement made between the plaintiff and his wife was to dissolve the community and joint tenancy character of the properties affected thereby, and transmute the specific properties received by each under said settlement into his or her separate property.

III.

The accounts receivable of $31,958.67 owned entirely by the community and the 75% interest of the community in the accounts receivable of Johnson & Johnston, in the sum of $20,069.78, or a total accounts receivable of $52,028.45, representing legal fees earned, but not collected prior to March 4, 1935, received by the plaintiff in said property settlement, became and were his separate property by virtue of the said property settlement agreement.

IV.

The accounts receivable of $52,028.45 were the separate property of plaintiff when collected and his income tax was levied on a cash basis and all of said collections thereof in the sum of $52,028.45 were taxable to plaintiff. [43]

V.

The transfer by plaintiff to his wife of his undivided one-half interest in certain joint and community assets and the transfer by his wife to plaintiff of her undivided one-half interest in the remaining joint and community assets, including

said accounts receivable in the total amount of $52,028.45, which transfers were accomplished by said property settlement, did not constitute reciprocal "sales," "exchanges," "dispositions of," "dealings in" property or any other type of transaction whereby gain or loss was recognized to each or either of the two spouses under the Federal revenue statutes relating to income tax.

VI.

The transformation of said community accounts receivable of $52,028.45 into the separate property of plaintiff was not an assignment without valuable consideration in the nature of a gift to plaintiff from his wife.

VII.

The plaintiff's wife did not, by the transfer of her one-half interest in said accounts receivable in the amount of $52,028.45 to plaintiff and the receipt by her of plaintiff's one-half interest in other property of equal value receive such economic enjoyment therefrom as would make her taxable on one-half of the face and market value of said accounts receivable.

VIII.

Said property settlement was a division or partition of common property on which no gain or loss was recognized to the spouses at the time of said division or partition under the Federal revenue statutes relating to income tax.

IX.

Upon said division or partition of common property, no part of plaintiff's cost of $65,919.75 of his one-half interest, in all of the community and joint properties owned by the two spouses on March 4, 1935, is property allocated to him as the cost or other basis of the one-half [44] interest in said accounts receivable acquired by plaintiff from his wife.

X.

Upon said division or partition no part of his said wife's income tax for 1934 in the sum of $5,082.78 and 1935 in the sum of $3,118.95, assumed and paid by plaintiff in accordance with said agreement, is properly allocated to him as the cost or other basis of the one-half interest in said accounts receivable acquired by plaintiff from his wife.

XI.

Upon said division or partition no part of plaintiff's cost of $38,610.41 of his one-half interest in the specific properties transferred by him to his wife by said property settlement agreement is property allocable to him as the cost or other basis of the one-half interest in said accounts receivable acquired by plaintiff from his wife.

XII.

The collections from the accounts receivable in the total sum of $52,028.45 representing legal fees earned prior to March 4, 1935, and collected by

plaintiff in 1935 after March 4th, were taxable to him alone and were not divisible between him and his wife for Federal income tax purposes. No part thereof was taxable to his wife.

XIII.

The March 4, 1935, disposition, and transformation into plaintiff's separate property, of the community accounts receivable in the amount of $31,958.67 and of the community 75% interest in the accounts receivable of Johnson & Johnston, in the sum of $20,069.78, did not constitute the realization by his wife of income within the purview of the Federal statutes relating to income tax.

XIV.

Such disposition and transformation of such accounts receivable, in the total sum of $52,028.45, when coupled with plaintiff's subsequent collection and receipt thereof, did not constitute the realization by his wife of income within the purview of said statutes. [45]

XV.

The collection by plaintiff of said transformed receivables in the total sum of $52,028.45 constituted the realization of gross income by him to the extent of 100% thereof, without the deduction therefrom of any cost or other basis.

XVI.

Plaintiff is entitled to an additional deduction as a business expense of $775.40 for club dues and club expenses.

XVII.

Plaintiff is entitled to judgment against the defendant for the recovery of $298.21, with interest thereon at the rate of 6% per annum from June 11, 1938, until a date preceding the issuance of a refund check therefor by not more than 30 days; together with his costs herein.

Exceptions allowed plaintiff and defendant.

Dated: June 29, 1942.

J. F. T. O'CONNOR,
United States District Judge.

Approved as to form under rule 8.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Asst. United States Attorney.

By
Attorneys for Defendant.

[Endorsed]: Filed Jun. 29, 1942. [46]

In the District Court of the United States in and for the Southern District of California Central Division.

No. 1195-O'C

TODD W. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled cause having been tried before the Court sitting without a jury; plaintiff appearing in propria persona and the defendant appearing by its attorneys William Fleet Palmer, United States Attorney for the Southern District of California, and E. H. Mitchell, Assistant United States Attorney for said district; the cause having been submitted upon the pleadings, the stipulation of facts and oral testimony; the Court having made and caused to be filed herein its written Findings of Fact and Conclusions of Law; and the Court being fully advised in the premises:

It is ordered, adjudged and decreed that the defendant repay and refund to plaintiff as and for Federal income taxes and interest thereon overpaid by plaintiff to defendant for the calendar year 1935 in the amount of Two Hundred Ninety-Eight Dollars and Twenty-one Cents ($298.21), together with interest thereon at the rate of six per cent

(6%) per annum from June 11, 1938, to a date preceding the issuance of the refund check or checks therefor by not more than thirty (30) days, such date to be determined by the Commissioner of Internal Revenue; and that plaintiff have judgment against the [47] defendant for his costs taxed in the sum of

Exceptions allowed both plaintiff and defendant.

Dated this 30 day of June, 1942.

J. F. T. O'CONNOR,
United States District Judge.

Approved as to form as provided by Rule 8:

WILLIAM FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed and Entered Jun. 30, 1942.

[48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Todd W. Johnson, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from so much of that certain Judgment entered in the above entitled action on June 30, 1942, as holds that because plaintiff on March 4,

1935, in a property settlement with his wife, received certain community accounts receivable of the total face and market value of $52,028.45, representing legal fees earned but not collected, and thereafter during said year collected all of said accounts receivable, said plaintiff realized taxable gross income in 1935 of all or any part of said $52,028.45 thus collected by him.

Dated this 13th day of July, 1942.

TODD W. JOHNSON,
In Propria Persona, Appellant
433 South Spring Street,
Los Angeles, California.

[Endorsed]: Filed & Mld. Copy U. S. Atty. Jul. 13, 1942. [67]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To Edmund L. Smith, Clerk of the United States District Court, Southern District of California:

The Appellant intends to rely upon the following points in the above entitled appeal:

I.

That the District Court erred in holding that plaintiff received taxable income of $52,028.45, instead of $26,014.23, when he collected certain ac-

counts receivable representing legal fees earned but not collected, because he owned all instead of one-half interest in said accounts at the time they were collected, notwithstanding the fact that he only owned a community one-half interest therein when said fees were earned and despite the fact that he acquired his wife's community one-half thereof in a property settlement whereby he gave up or conveyed to her his one-half interest in other joint and community property having a cost and value equal to the face and market value of said accounts. [70]

II.

That the District Court erred in holding as a matter of law that the ownership of said accounts at the time they were collected, and not the ownership thereof when they were earned, determined the person or persons who must pay the income tax thereon.

III.

That the District Court erred in failing to hold that the transfer to plaintiff by his wife of her community one-half of said accounts receivable, representing legal fees already earned but not collected, in return for plaintiff's one-half interest in other community and joint property and his payment of her 1934 and 1935 income taxes, was a taxable event or final event of enjoyment whereby she realized income or gain on a cash basis to the full extent of her half interest in said fees.

IV.

That the District Court erred in failing to hold that plaintiff's wife realized gain or loss in the property settlement, computed or based upon the difference between the cost of her one-half interest in certain joint and community property, which she transferred to plaintiff, and the market value of plaintiff's one-half interest in certain other joint and community property which he transferred to her.

V.

That the District Court erred in failing to hold that plaintiff realized gain or loss in the property settlement, computed or based upon the difference between the cost of his one-half interest in certain joint and community property which he transferred to his wife (plus certain of her income taxes assumed and paid by him) and the market value of her one-half interest in said accounts receivable and other joint and community property which she transferred to him.

VI.

That the District Court erred in failing to hold that plaintiff realized no income when he collected the one-half interest in said accounts receivable, representing legal fees earned but not collected, which he acquired from his wife in said property settlement. [71]

VII.

That the District Court erred in failing to hold that said property settlement was a sale, exchange

or disposition of, or dealing in, property whereby gain or loss was realized by each spouse, based upon the difference between his or her cost of the one-half interest conveyed to, and the market value of the one-half interest received from, the other spouse, with proper adjustment for income tax of his wife assumed and paid by plaintiff.

VIII.

That the District Court erred in holding that the property settlement was a transaction whereby no gain or loss was recognized to either spouse.

IX.

In the alternative that, even if the property settlement was a tax free exchange, disposition of or dealing in fractional interests in property, on which no gain or loss was recognized to either spouse, the District Court erred in failing to hold that before plaintiff realized any taxable income when he subsequently disposed of the one-half interest in said fees acquired from his wife by collecting the sum of $26,014.23, he was entitled to recover the sum total of his cost of his one-half interest in certain other joint and community property which he gave up or transferred to her and her 1934 and 1935 income taxes paid by him for her.

X.

The District Court erred in failing to hold that, regardless of whether the property settlement was

a transaction whereby gain or loss was or was not recognized to each or either of the spouses, plaintiff was entitled to recover his cost of his one-half interest in the joint and community property which he transferred to his wife, and the income taxes paid by him for her, before he realized any taxable income from his subsequent disposition by collection of the one-half interest in said accounts acquired from her.

XI.

In the alternative the District Court erred in failing to hold that, if said property settlement was a division or partition of common property on which no gain or loss was recognized to either spouse, plaintiff's cost of $65,919.75 [72] for his half interest in all the joint and community property of the spouses, plus the income taxes of his wife assumed and paid by him in the sum of $8,201.73, should be re-allocated to, and as the cost of, the specific properties received by him, including said accounts receivable, in the proportion which the fair market value of each property received bears to the market value of all the properties received by him.

XII.

In the alternative the District Court erred in failing to hold that, if said property settlement was a division or partition of common property on which no gain or loss is recognized, plaintiff is entitled to recover his allocated cost thereof, com-

puted as set forth in the paragraph next above, before he realized any gain or income from his subsequent disposition of said accounts receivable by collecting them.

You are hereby requested to include in the record on appeal the complete record and all the proceedings and evidence in this action, including specifically the following papers:

1. Complaint.
2. Answer.
3. Stipulation of Facts.
4. Reporter's Transcript of Evidence, including all exhibits of plaintiff and defendant.
5. Opinion.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Notice of Appeal.
9. Clerk's Certificate.
10. This Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Contents of Record on Appeal.

Dated this 13th day of July, 1942.

TODD W. JOHNSON,
In Propria Persona, Plaintiff.

Received copy of the within Statement & Designation this 13th day of July, 1942.

WM. FLEET PALMER,
U. S. Atty.
E. H. MITCHELL,
Asst. U. S. Atty.,
Attorneys for defendant.

[Endorsed]: Filed Jul. 13, 1942. [73]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

To Edmund L. Smith, Clerk of the United States District Court, Southern District of California:

In addition to the documents designated by the Plaintiff and Appellant for inclusion in the record on appeal, Defendant-Appellee requests that there be included therein the following, to wit:

(1) Defendant's motion to amend and to make additional findings and conclusions under Rules 52(b) and 59(a)(2), dated and filed herein July 9, 1942, and now noticed for hearing on July 27, 1942.

(2) Any and all orders hereafter made by the Court in response to said motion. [88]

(3) Any and all new and amended findings and/or conclusions hereafter made by the Court of its own motion and/or pursuant to said motion of the Defendant-Appellee.

(4) This designation of additional contents of record on appeal.

(5) The Clerk's certificate in respect thereof.

Attention is called to the fact that the time for the Government to cross-appeal from that portion of the judgment adverse to it will not expire until the 30th day of September, 1942.

In the event of cross-appeal by Defendant, it

requests that there be included in the record on appeal, in order to comply with Rule 75(k) of the Rules of Civil Procedure, the following additional documents, to wit:

(a) Defendant's notice of appeal.

(b) Defendant's statement of points on which it intends to rely on cross-appeal.

(c) This designation and any additional designation of contents of record on cross-appeal hereafter filed by the Defendant.

(d) The Clerk's certificate in respect thereof.

Dated: July 22, 1942.

WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Assistant United States Attorney,
Attorneys for Defendant-Appellee.

[Endorsed]: Filed Jul. 22, 1942. [89]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of

California, do hereby certify that the foregoing pages numbered from 1 to 90, inclusive, contain full, true and correct copies of Complaint for the Recovery of Federal Income Taxes; Answer; Opinion; Special Findings and Conclusions of Law; Judgment; Plaintiff's Exhibits 1, 2 and 3; Defendant's Exhibits A and B; Notice of Appeal; Bond on Appeal; Statement of Points on which Appellant intends to rely on appeal and designation of Contents of Record on Appeal; Motion to Amend and to Make Additional Findings and Conclusions under Rules 52(b) and 59(a)(2); Minute Order of July 31, 1942; Memorandum; Defendant's Designation of Additional Contents of Record on Appeal and Affidavit of Service, which, together with the Original Reporter's Transcript transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to $17.00 which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 6th day of August, 1942.

[Seal] EDMUND L. SMITH,
Clerk.
By THEODORE HOCKE,
Deputy.

TESTIMONY

Los Angeles, California
Thursday, September 18, 1941
10:20 O'clock A. M. [2*]

At this time I would like to file a stipulation of facts which have been agreed to by counsel for the parties.

The Court: It will be received.

Mr. Mitchell: Will that be marked as an exhibit or not?

The Court: Yes, I think so.

The Clerk: Plaintiff's Exhibit No. 1.

(The stipulation of facts referred to was received in evidence and marked as "Plaintiff's Exhibit No. 1.")

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the Court may accept the following as part of the facts of this case. Each party hereto expressly reserves the right to offer further evidence not inconsistent with the facts stipulated herein.

I.

That plaintiff, Todd W. Johnson, is now and at all times mentioned herein was a resident of the

*Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiff's Exhibit No. 1 (Continued)

County of Los Angeles, State of California and subject to the jurisdiction of this Court.

II.

Plaintiff is a citizen of the United States of America, has always borne true faith and allegiance thereto, and has never in any way either directly or indirectly aided or abetted anyone in rebellion thereagainst.

III.

The jurisdiction of this Court in the premises is dependent upon a Federal question in that the cause of action arises under the laws of the United States pertaining to the Internal Revenue.

IV.

Plaintiff married Esther Jeanne Johnson in 1921 in the State of Kansas and moved to the State of California in 1925 where they lived together as husband and wife continuously until August 28, 1934, with their residence and domicile in the State of California. Plaintiff entered upon the practice of the law in the City of Los Angeles in June, 1929, at which time plaintiff resigned from the service of the Federal Government, having then no property of any consequence and liabilities in excess of the value of any property then owned by himself and/or his said wife.

V.

On May 26, 1933, plaintiff and Philip D. Johnston, both attorneys at law, formed the partnership of Johnson & Johnston to engage in the practice of

Plaintiff's Exhibit No. 1 (Continued)

the law in the City of Los Angeles, State of California, and plaintiff was a member of said partnership at all times thereafter involved in this action. A true copy of said partnership agreement is attached hereto marked Exhibit 1 and made part hereof by reference.

VI.

The books and records of plaintiff and of plaintiff's law firm of Johnson & Johnston in the year 1935 and prior thereto were kept on the cash receipts and disbursements basis, and all of the income tax returns involved herein, including those of said firm, were made and filed on the cash receipts and disbursements basis.

VII.

On or before March 15, 1936, the plaintiff filed his separate Federal income tax return for the calendar year 1935, reporting therein gross income of $33,610.28 and net taxable income of $26,541.18 and tax payable thereon of $3,118.95 which he paid to defendant during the calendar year 1936. On or before March 15, 1936, said Esther Jeanne Johnson filed her separate Federal income tax return for said calendar year 1935, reporting therein identical amounts of gross and net taxable income and tax payable thereon of $3,118.95 which plaintiff paid for her during the year 1936.

VIII.

Subsequent to March 15, 1936, the Commissioner of Internal Revenue made his audit of plaintiff's

Plaintiff's Exhibit No. 1 (Continued)

said income tax return and determined that plaintiff was liable for a deficiency tax for said year 1935 in the amount of $7,821.89, plus interest of $1,025.84, or a total of $8,847.73.

IX.

In arriving at said alleged deficiency tax of $7,821.89 said Commissioner determined that plaintiff had a taxable net income of $54,860.13.

X.

Said net income figures of $54,860.13 includes the following gross personal fees (as distinguished from partnership fees) received between March 4, 1935, and December 31, 1935, by plaintiff for services performed by him prior to March 4, 1935:

Viber Company fee for legal services	$ 112.00
Roy Tracy fee for legal services	55.00
¾ of Wm. G. Kerckhoff Estate fee for legal services	31,791.67
Total	$31,958.67

The other ¼ of the Wm. G. Kerckhoff Estate fee was the property of said partnership of Johnson & Johnston. All of said amounts totalling $31,958.67 were accounts receivable due to plaintiff personally on March 4, 1935, and were the community property of plaintiff and his then wife, Esther Jeanne Johnson, prior to the separation agreement entered into on March 4, 1935, mentioned hereinafter. Plaintiff included in his 1935 income tax return one-half of said sum of $31,958.67 or the sum of

Plaintiff's Exhibit No. 1 (Continued)

$15,979.39 as his community one-half thereof, and his then wife included the other half thereof in her 1935 return.

XI.

On March 4, 1935, said partnership of Johnson & Johnston had outstanding accounts receivable for legal services rendered by the partners in the total sum of $26,759.71 which were collected between March 4, 1935, and December 31, 1935. Said $26,759.71 consisted of the following partnership accounts receivable for fees earned under contracts entered into by plaintiff individually or by his said law firm on the following dates shown opposite the respective fees:

Name of Client	Amount of Account Receivable	Contract Entered into by Plaintiff	Contract Entered into by Partnership
Bartholomae Oil Corp.	$2,957.50	3/ 1/32	
John B. Newman Estate	1,500.00	9/19/30	
John Gilbert	1,000.00		7/13/33
Gertrude T. Reeves Estate	2,700.35		9/18/33
Crosby Productions Inc.	300.00		7/ 1/33(1)
Aztec Brewing Co.	1,000.00	5/12/33	(2)
Carver Investment Co.	340.86	12/12/32	
Will E. Keller Estate	1,500.00		3/ 4/35(3)
L. M. McDonald	795.15	8/ 2/32	
80% of ¼ of Kerckhoff Estate Tax case	8,477.81	9/26/30	
Kerckhoff Company County Tax case	6,188.04	9/22/31	
Total	$26,759.71		

(1) One-fourth (¼) of annual retainer fee.

(2) One-half (½) of annual retainer fee.

(3) One-half (½) of retainer fee of $3,000.00 contracted for on March 4, 1935.

Plaintiff's Exhibit No. 1 (Continued)

All of the above-listed fee contracts that had been entered into by plaintiff prior to May 26, 1933, were transferred by him on May 26, 1933, to said partnership of Johnson & Johnston and at all times subsequent to said date were the property of said partnership. All of said accounts receivable so collected were included as income in the income tax information return filed by said partnership with said Collector for the calendar year 1935 which showed a gross income of $42,653.82 and a total net income of $32,955.49. The Commissioner determined that said partnership had a net income during 1935 of $33,976.03 which also included said $26,759.71 of accounts receivable as of March 4, 1935. Plaintiff had a seventy-five per cent (75%) interest in said partnership and in said $26,759.71 of accounts receivable, or $20,069.78. The difference of $1,020.54 between the net income returned by the partnership of $32,955.49 and that determined by the Commissioner of $33,976.03, represents the club dues and expenses of the partners as set forth in paragraphs XVII and XVIII of the complaint, which were disallowed by the Commissioner. All of said $26,-759.71 was earned by said partnership between May 26, 1933, and March 4, 1935.

XII.

Of plaintiff's said 75% share of partnership accounts receivable on March 4, 1935, to-wit, $20,-069.78, he reported one-half thereof or $10,034.89

Plaintiff's Exhibit No. 1 (Continued)

and his wife reported the other half in their respective 1935 income tax returns. The Commissioner determined that 100% of said partnership accounts receivable, to-wit, $20,069.78, was taxable solely to plaintiff and none thereof taxable to his wife.

XIII.

After considerable negotiations between the attorneys for Esther Jeanne Johnson and plaintiff a property settlement agreement was entered into on March 4, 1935, between them, a true copy of which is attached to the complaint herein and marked Exhibit "A". Said copy is made a part hereof the same as if set forth herein in full.

XIV.

On March 5, 1935, Esther Jeanne Johnson filed an action in the Superior Court of Los Angeles County, California, against plaintiff praying for a divorce from him on the grounds of cruelty. On April 1, 1935, said court entered an interlocutory decree of divorce, and on April 2, 1936, said court entered a final decree of divorce, completely and finally dissolving and severing the bonds of matrimony between her and plaintiff.

XV.

At the same time that said Commissioner determined that plaintiff owed a deficiency income tax for the calendar year 1935, in the sum of $7,821.89, plus interest of $1,025.84, or a total of $8,847.73, he

Plaintiff's Exhibit No. 1 (Continued)

also determined that said Esther Jeanne Johnson had made an over-payment of her income tax for the calendar year 1935 in the sum of $3,006.80, which she was entitled to have refunded with interest of $328.47, or a total of $3,335.27. This over-payment resulted from the determination by said Commissioner that plaintiff was taxable on all of said individual and partnership income collected between March 4, 1935, and December 31, 1935, instead of only one-half thereof as reported in his return. By agreement between Esther Jeanne Johnson, said Commissioner and plaintiff, said over-payment and interest thereon computed by the Commissioner to have been made by said Esther Jeanne Johnson was credited against said determined deficiency income tax and interest computed by the Commissioner to be due from plaintiff, and on June 11, 1938, plaintiff paid to defendant the difference of $5,512.56.

XVI.

That plaintiff on April 2, 1940, filed his claim for refund with defendant in the sum of $7,148.11. A true copy thereof is attached to the complaint herein, marked Exhibit "B", and is made a part hereof by reference. By letter dated September 21, 1940, addressed to and duly received by plaintiff, said Commissioner rejected plaintiff's said claim for refund in full. A true copy of said letter rejecting said claim for refund is attached to the complaint herein, marked Exhibit "C", and is made a part hereof by reference.

Plaintiff's Exhibit No. 1 (Continued)

XVII.

That as a part of said agreement to credit said overassessment of Esther Jeanne Johnson against said determined deficiency income tax of plaintiff, the said plaintiff agreed with said Commissioner that in the event plaintiff should file a claim for refund or court action for recovery of income tax paid by him for the year 1935 on account of the income so held by the Commissioner to be plaintiff's separate property and not community property, any recovery on the community property basis shall be limited to the net amount after giving effect to the resulting tax due from his wife and barred from assessment against her by the statute of limitations.

XVIII.

Said claim for refund is the only claim for refund filed by plaintiff in the premises and has not been sold, assigned, or otherwise transferred or disposed of to any other person, and is the property of the plaintiff at the present time.

PHILIP D. JOHNSTON
TODD W. JOHNSON
Attorneys for Plaintiff
WM. FLEET PALMER,
United States Attorney
C. H. M.
E. H. MITCHELL,
Asst. United States Attorney
Attorneys for Defendant

Plaintiff's Exhibit No. 1 (Continued)

EXHIBIT 1

ARTICLES OF CO-PARTNERSHIP

Todd W. Johnson and Philip D. Johnston do hereby associate themselves together as co-partners to engage in the practice of law, upon the following terms:

The firm shall be known and do business as Johnson & Johnston;

The firm shall begin business on June 1, 1933, and continue thenceforth, except that either party may terminate it at the end of any calendar year by giving to the other notice at least thirty days before the end of any such year of his desire to terminate the co-partnership.

Todd W. Johnson shall contribute the sum of Three Thousand Dollars ($3,000.00) in cash to the firm's opening bank account at the commencement of business, which sum shall be credited to his personal account and be withdrawable by him wholly or in part when the condition of the said bank account warrants it. Philip D. Johnston shall contribute the sum of One Thousand Dollars ($1,000.00) in cash to the firm's opening bank account at the commencement of business, which shall be credited to his personal account and be withdrawable by him wholly or in part when the condition of said bank account warrants it.

The firm bank account shall be in the joint names of the two partners and be subject to check by either. A set of books shall be kept similar to that

Plaintiff's Exhibit No. 1 (Continued)

heretofore kept by Todd W. Johnson, to be opened June 1, 1933, and to contain all such accounts as may be necessary to properly record the financial affairs of the firm. Said books shall be closed at least as often as December 31st of each calender year so as to show the profits of the business and the condition of the proprietorship accounts.

Todd W. Johnson shall contribute to the business all of his office furniture, fixtures, machinery and books at present employed in his business, at their depreciated value at June 1, 1933, which shall be credited to his capital account. The depreciated value as of said date of his Packard automobile shall also be credited to his capital account. Philip D. Johnston's capital account shall be credited with the value of his Packard automobile on said date at $500.00. Proper asset accounts shall be set up for all said assets so contributed as aforesaid, and depreciation accounts for all depreciated assets.

The profits and losses of the firm's business shall be divided seventy-five per cent (75%) to Todd W. Johnson and twenty-five per cent (25%) to Philip D. Johnston. In computing such profits on losses there shall first be deducted from gross income all salaries of employees of the firm, office rent and other office expenses, the club dues of both partners, depreciation on all depreciable capital assets, and the automobile expenses of both partners on the same basis as such expenses have heretofore been handled on the books of Todd W. Johnson.

The following fees, if, as and when collected

Plaintiff's Exhibit No. 1 (Continued)

shall not be considered partnership fees, but shall be the sole property of Todd W. Johnson: (1) Eli P. Clark 1929 claim for refund; (2) Eli P. Clark Co. 1926 to 1931, inclusive; (3) Del Rey Co. 1930 and 1931; (4) Seventy-five per cent (75%) of the fees hereafter collected from the several cases involving income tax and/or penalties from Canadian corporations or their American Parent corporations; (5) Seventy-five per cent (75%) of the fees hereafter collected from the Wm. G. Kerckhoff Estate Tax cases and State Inheritance Tax cases; (6) The outstanding unpaid balance of the old Cass & Johansing fee; (7) Fees received from the Estate of George F. Getty, deceased and Geo. F. Getty, Inc., on account of services performed prior to June 1, 1933; and (8) all fees received on bills issued prior to June 1, 1933, on cases upon which no more work is to be done. It is assumed for the purpose of these articles that Items (1), (2) and (3) in this paragraph have been closed with the Bureau; if such should not prove to be the case, an adjustment of these fees will hereafter be agreed upon. The fee from the J. B. Newman Estate tax case shall be a partnership fee if and when collected.

Philip D. Johnston shall have as his sole property the first Five Hundred Dollars ($500.00) collected from the Charles Lantz estate under his contract dated March 31, 1933, but thereafter all fees from said case shall be partnership fees.

Todd W. Johnson shall have a drawing account of

Plaintiff's Exhibit No. 1 (Continued)

$1,200.00 per month on account of profits. Philip D. Johnston shall have a drawing account of $400.00 per month on account of profits. At the end of each year each partner shall have the benefit of any undrawn balance of his drawing account, and may withdraw same at his option if the condition of the firm's bank account warrants it, before the distribution of any further profits that may be available for division. The share of each partner in profits not distributed shall be credited to his personal account.

In the event this partnership is terminated by a thirty day notice of either partner as aforesaid, Todd W. Johnson shall be entitled to receive all fees collected on all cases after such termination, except:

1. P. D. Johnston shall be entitled to take with him any case and the fees then due or to become due thereon wherever the client employed him primarily to handle said case in the first instance;

2. If partnership terminates on December 31, 1934, or prior thereto, P. D. Johnston shall be entitled upon said termination to receive Twenty-five (25%) per cent of all fees then actually due whether or not bills therefor have been sent to the particular client, but he shall be entitled to receive no part of the balance due or to become due on any fee when the case is not completed at the date said partnership is terminated.

Plaintiff's Exhibit No. 1 (Continued)

3. Todd W. Johnson shall be entitled to take with him any case and fees then due or to become due thereon wherever the client employed him primarily to handle said case in the first instance.

4. In the event of the death of said Philip D. Johnston at any time there shall be paid to his estate twenty-five per cent (25%) of all fees due whether bills have been sent out or not, and in addition thereto if his death occurs prior to December 31, 1934, there shall be paid to his estate when such fees are collected ten per cent (10%) of all fees on cases in the office on the date of his death but not then completed, except those upon which the fees are specified above as belonging to Todd W. Johnson personally. In the event said death occurs after December 31, 1934, there shall be paid to his estate when such fees are collected fifteen per cent (15%) of all fees collected from all cases then in the office but not completed, except those upon which the fees are specified above as belonging to Todd W. Johnson personally.

5. In the event of the death of said Todd W. Johnson there shall be paid to his estate seventy-five per cent (75%) of all fees then due whether bills have been sent out or not, and in addition thereto there shall be paid to his estate when such fees are collected fifty per cent (50%) of all fees collected on all cases in

Plaintiff's Exhibit No. 1 (Continued)

the office but not completed at the date of his death.

In the event of said termination as aforesaid Todd W. Johnson shall be entitled to the offices, furniture, fixtures, machinery, and books of said partnership, and his automobile and his capital or personal account shall be charged therefor the depreciated cost thereof as of the date of said termination.

Witness our hands and seals this 26th day of May, 1933.

(Signed) TODD W. JOHNSON

(Signed) PHILIP D. JOHNSTON

Subscribed and sworn to before me this 26th day of May, 1933.

[Seal] (Signed) L. C. JOHNSON

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed 9-18-41.

Mr. Mitchell: I might make a brief opening statement on behalf of the defendant, if your Honor please. [4]

If the Court should hold that the agreement constituted sales and purchases by the respective parties one from the other, then it will be necessary to determine a very different question, that is, whether either of the parties suffered losses or realized gains from these capital transactions.

It will then be necessary to determine just what the wife gave up, and the value of what she gave up, and determine what the husband gave up, exactly what value that he gave up. It will be necessary to determine the wife's cost basis of what she gave up, as well as the husband's cost basis of what he gave up. [6]

To do that intelligently would require, under the Government's contention, expert testimony because of the peculiar rights of the husband and wife in the co-owned community property.

The Government therefore will object to any testimony as to values, market values, of the property at the time, the cost basis of the property at the time, upon the ground that the transaction was a partition or division and not a capital transaction.

If the Court should hold that they were capital transactions and the agreement constituted sales and purchases between the parties, then the Government feels that it will be necessary to call in experts to testify as to the economic value of the wife's interest, what it cost her, whether there was any cost basis, and so on, and so on. [7]

Mr. Johnson: Mr. Mitchell has stated that he is willing to stipulate that if I were placed on the stand my testimony as to the cost of certain properties to the community and as to the actual market values of those properties on March 4, 1935, would be the same as if I appeared on the stand and testified thereto.

Am I correct in that statement, Mr. Mitchell?

Mr. Mitchell: That is correct, subject to certain objections which I desire to make before the evidence is offered to the Court.

Mr. Johnson: I will ask that this document be marked [8] for identification.

The Clerk: Plaintiff's Exhibit No. 2 for identification.

(The document referred to was marked "Plaintiff's Exhibit No. 2 for identification.")

Mr. Mitchell: Which one is that?

Mr. Johnson: That is the statement entitled "Cost to Community and Market Value of Assets Received by Esther Jeanne Johnson Under Property Settlement Agreement Dated March 4, 1935."

Mr. Johnson: I will now offer as Plaintiff's Exhibit 3, a statement describing several pieces of property and with figures showing the cost therefor to the community, and the market value of each particular parcel of property on March 4, 1935, with the understanding that this statement is to have the same effect as if I had so testified on the stand.

Mr. Mitchell: The defendant will so stipulate subject, however, to certain objections, of course, that such evidence [9] is wholly incompetent, irrelevant, and immaterial, and outside of the issues in this case.

The defendant further objects to such offer for this reason: The offer is made to establish a sale and purchase of accounts receivable by the plaintiff from his wife, or rather her so-called undivided half of those accounts receivable.

That raises the question of whether or not the property settlement agreement constituted sales and purchases. Before the Court can intelligently pass upon the question of whether or not the agreement constituted sales and purchases, I would like to cross examine the plaintiff on that question. [10]

TODD W. JOHNSON

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Mr. Mitchell: This witness is called under the rule providing for the calling of adverse witnesses for cross examination. I don't recall the number of the rule, if the Court please.

The Court: I think it is 43, but proceed, Mr. Mitchell.

Direct Examination

By Mr. Mitchell:

Q. You alleged in your complaint, Mr. Johnson, that prior to the execution of the property settlement agreement that you had numerous conferences with Mr. W. I. Gilbert, Mrs. Johnson's counsel, concerning the proposed property settlement agreement? A. I did.

Q. The object of those conferences was to determine the nature and amount and value of the community property for [11] one thing, was it not? That was one of the objects? A. It was.

Q. Mr. Gilbert wanted to know what the com-

(Testimony of Todd W. Johnson.)

munity property consisted of and its approximate value? A. He did.

Q. And another purpose of both parties—withdraw that last.

You had in mind the fact, the understanding, did you not, that Mrs. Johnson was about to sue you for a divorce on the ground of cruelty, or was about to sue you for divorce on some ground?

A. That is correct.

Q. And it was your desire and Mrs. Johnson's desire, acting through her agent, Mr. Gilbert, that the property rights of the parties be settled outside of the divorce action? A. That is correct.

Q. You knew at the time that in the event that the community property questions were submitted to a divorce court that Mrs. Johnson would be entitled to at least one-half in value of the community property, did you not?

A. No, I did not, Mr. Mitchell. I didn't know what the court would hold on that.

I knew that she would have some claim to community property. Just what that would be, I didn't know.

Q. You didn't look at the California statute on that [12] point?

A. Yes, I was familiar with the statute.

Q. At that time?

A. But I also knew that I might file an action against her or a counter-action in case there was any dispute over property.

(Testimony of Todd W. Johnson.)

Q. Now, during these preliminary conferences you revealed to Mr. Gilbert the various pieces of community property and joint tenancy property, such as those that are set out finally in the executed agreement on the 4th of March?

A. Yes, I even took my books of account over to his office so that he might look them over.

Q. And then you and Mr. Gilbert endeavored to determine the value of the different items of community property, did you not? A. We did.

Q. And then you endeavored to—withdraw that.

It was explained to you, was it not, at that time, before the agreement was even drafted, that Mrs. Johnson did not want a half interest in the earned fees?

A. At the beginning I suggested to Mr. Gilbert that it would be very easy to draw up a settlement, that we could have just undivided interest in everything.

Q. You mean give her half and you take half?

A. Each piece of real estate and each piece of personal property, and that any collections from accounts would [13] be divided 50-50, and so on.

Q. Upon future collections?

A. Well, either before or after collections, and an assignment could then be made at the time. That was in our first conference, and then he said he was inclined to think that perhaps Mrs. Johnson wouldn't want that, that she would want separate individual properties, and that was the purpose of

(Testimony of Todd W. Johnson.)
the conference, to determine if we could segregate the individual properties and each take divided interests rather than undivided interests.

Q. Equally divided interests?

A. Yes, equally, and at a later conference that was accomplished.

Q. You mean by "equally divided interests," that she should take these parcels and you should take those parcels but that they should be as nearly equal in value as possible?

A. That is correct.

Q. Sometimes known as a division in kind or a distribution in probate in kind, these distributees will take this property and other distributees will take that property, but they must be equal in value? Distribution in kind, or maybe you don't know what I mean by "distribution in kind."

A. At least our idea was that we would do things fairly and when we ended up each one would have half, although each one would have specific properties rather than [14] undivided interests.

Q. Each would have a half at least in approximate value. A. Yes. [15]

Mr. Mitchell: Now, if the Court please, continuing my argument, objecting to the document which had been offered, * * *. [16]

If the Court holds that the settlement evidenced capital transactions entered into for profit and con-

stituted sales or exchanges between the parties and is not a division, and that the wife had power to dispose of, not merely relinquishes her interest in the community property, then to determine the taxable gains or deductible losses of the respective spouses, the values of the following rights, titles, and interests transferred, received, and exchanged by the husband must be determined, first, the value of his separate title and interest in the joint tenancy property and, second, the value during marriage of his interest in and the value of his rights, powers and personal economic benefits in respect to each parcel of community property, and the cost basis to him—not to the community—of each parcel, and also the value—the Court will also have to determine the values of the following rights, titles, interests, transferred, received and exchanged by the wife, first, the value of her separate title and interest in the joint tenancy property, second, the value of her interest in and her rights, powers and personal economic benefit in respect to each parcel [43] of community property, third, the value of her right to support and maintenance from her husband after February 28, 1935, the time when the year's support expired under the agreement, and fourth, the value of her right to temporary support, the value of her right to costs and attorney's fees from her husband in the event of a divorce action, and fifth, the cost basis to her—not to the community—of each parcel.

Now, that is a big order, if the Court please.

Mr. Johnson: If your Honor please, I think some of the matters mentioned by Mr. Mitchell are not necessary to determine. I think the only thing it is necessary to determine is the cost of the various properties to the community, and the market value of those properties on the date of the property settlement agreement.

The parties themselves settled all of these matters that were mentioned by Mr. Mitchell at arm's length and they were fixed. The testimony that is objected to is my testimony as to the cost to the community of the various assets and the market value of those assets on March 4, 1935, as to the competency, and as to these values and costs, and cost basis being material to the issues in the case.

[44]

Mr. Johnson: Yes, and there is some slight testimony also in connection with these properties.

The Court: We will have that and withhold this ruling.

Mr. Johnson: I have another document, or statement, entitled "Cost to Community and Market Value of Property Received and Liabilities Paid by Todd W. Johnson under Property Settlement Agreement dated March 4, 1935," which I would first like to have marked for identification as Plaintiff's Exhibit No. 3.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked "Plaintiff's Exhibit No. 3 for identification.")

Mr. Johnson: I would now like to offer Plaintiff's Exhibit 3 for identification into evidence, to have the same effect by stipulation as if Todd W. Johnson had gotten on the stand and testified as to the cost of each one of the properties listed and as to the market value on March 4, 1935, as [50] to each of the properties listed and as to the payment of the income tax liabilities described therein.

Mr. Mitchell: Defendant makes exactly the same objection to this offer as to the offer of Plaintiff's Exhibit 2, and adds to the grounds the following further objections, referring to Plaintiff's Exhibit 3 for identification, under the title "Liabilities Paid by Plaintiff under the Property Settlement Agreement," the objection to the 1934 income taxes assessed in the name of his wife, on the ground that those were community expenses arising out of the receipt of community income, and therefore were personal debts of the husband and were not the personal debts of the wife, and even upon plaintiff's theory should not be taken into consideration. [51]

The Court: That would balance that out.

I think I want to hear all of the evidence so that if my ruling is not satisfactory finally, that the record will be in such shape that it will not have to be tried again, and the entire case then can be decided adversely to my ruling, or the other way, and the Government must put in its objection in order to protect itself on the record. So I think that is the way to proceed. I will overrule the ob- [74] jection, and stating frankly why I am doing it. [75]

TODD W. JOHNSON

recalled as a witness by and in behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Johnson: I would like to give my qualifications as an expert witness on valuation.

For the period 1919 to 1929, I was employed by the Federal Government under the title of Internal Revenue Agent, but actually as an appraiser of estates for federal estate tax purposes. During that 10-year period I appraised the value of estates aggregating several hundred million dollars.

The estate, I would say, consisted principally of real estate, although they also involved closed corporation stocks, listed stocks, and in fact, property of every character.

From 1925 until 1929 I appraised estates in the Los Angeles area which included the city and surrounding vicinity.

From 1929 until 1935 I was engaged in the practice of law, but my practice consisted largely of federal estate taxes and state inheritance tax matters.

In connection with those matters, it was necessary, and I did appraise, estates involving many millions of dollars in Los Angeles and vicinity, and in this particular instance [76] just prior to March 1935, I made a thorough check of the particular properties and sales, rental and sales values in the

(Testimony of Todd W. Johnson.)
vicinity, and I think that I was fairly familiar with the properties at that time.

Mr. Mitchell: You referred to real estate involved in the property settlement agreement?

Mr. Johnson: Not only the real estate, but other types of properties as well.

You may cross examine, Mr. Mitchell.

Cross Examination

By Mr. Mitchell:

Q. Did you ever have occasion to appraise the value of the right to dispose of property or one-half of property by will?

A. I never did, no.

Q. Did you ever have the occasion to appraise the value of a 30-year old married woman's right to support and maintenance from her husband?

A. I did not.

Q. Would you say it is possible to appraise a value upon such a right?

A. I think it would be possible, given certain evidentiary facts in advance, yes.

Q. Age and the amount necessary for her support, you mean?

A. That, and also the earning capacity of the husband [77] during her expectancy, and her ability to support herself, and various factors of that kind that would have to be necessarily taken into consideration.

Q. Did you ever have occasion to appraise the

(Testimony of Todd W. Johnson.)

value of a California married woman's right or her option, statutory option, to set aside her husband's gift of community property if you knew the value of the community property?

A. I never had occasion to attempt to appraise that, no.

Q. Do you feel that such an optional right on the part of a wife is capable of valuation?

A. I don't believe it would be in the manner in which you state it. I think if you were given the proper facts I believe you could.

Q. Have you ever had occasion to appraise the value of a California married man's right and power to pay his debts out of the wife's half of the community property, his personal debts?

A. No, I have not.

Q. Have you ever had occasion to appraise the value of a husband's right to dispose for consideration freely of the wife's half of community personal property?

A. I have never appraised such a right. I don't think it would have any value, but I have never appraised it.

Q. Have you ever had occasion to appraise the value [78] of a husband's exclusive statutory right to manage and control the wife's half of the community property?

A. I have never appraised that right.

Q. Do you believe that the power to use the property is one or the chief essential elements in fixing values?

(Testimony of Todd W. Johnson.)

A. Mr. Mitchell, do you mean the right to use for your own benefit, or the right to use for someone else's benefit?

Q. The right to use for your own benefit.

A. For one's own exclusive benefit without payment of charge or payment of rent?

Q. That is right?

A. Yes, I think it has a valuable right.

Q. You mean by that, if you owned an automobile, but couldn't use it, it would have no value, would it?

A. It might have very much of a value. Someone else might be able to use it at my instance, or for my benefit.

Q. What are the elements of value? What makes property have a value? What is it in property that gives it a value, intrinsic, market, ecenomic value? You can differentiate if you like.

A. The right to use property for your own use or to rent it to someone else for their use, or the right to sell it generally are the things that make value. By value, I mean the ability to sell it.

Q. Now, what makes intrinsic value then, economic [79] value, other than the power to sell it?

A. It is the use that the particular property can be put to.

Q. And if the owner of property has exclusive power to use that property, it has no value to anyone but him, isn't that true, unless he gives it to somebody or gives the use to somebody else?

(Testimony of Todd W. Johnson.)

A. It may have quite a value to someone else if he must pay or account to the other party for the use of that particular property.

Q. Power to dispose of property is one of the very important elements in giving property a value, isn't it, as well as the power to use?

A. It is, but a trustee may be able to dispose of property and yet not be able to use the process for his own benefit at all, so that the power of disposition in such an instance would have no monetary value at all to the trustee.

Mr. Mitchell: I think that is all at the present time.

(Witness excused.)

Mr. Mitchell: These exhibits have now been introduced?

The Clerk: No.

Mr. Mitchell: The Court overruled the Government's objection to their offer.

The Court: They haven't been offered again, Mr. Mitchell. [80]

Mr. Johnson: I will now offer into evidence Plaintiff's Exhibits for identification Nos. 2 and 3.

Mr. Mitchell: I renew my objections on the same grounds.

The Court: They will be received.

The Clerk: Plaintiff's Exhibits 2 and 3 admitted into evidence.

(The documents showing cost to community and market value of property received and liabilities paid by Todd W. Johnson and Esther Jeanne Johnson were received in evidence and marked "Plaintiff's Exhibits 2 and 3, respectively.")

PLAINTIFF'S EXHIBIT No. 2

COST TO COMMUNITY AND MARKET VALUE OF ASSETS RECEIVED BY ESTHER JEANNE JOHNSON UNDER PROPERTY SETTLEMENT AGREEMENT DATED MARCH 4, 1935.

	Cost to Community	Market Value March 4, 1935
1. Real Estate described in Article 1 of Property Settlement Agreement	39,284.61	35,000.00
2. Real Estate described in Article 2 of Property Settlement Agreement	19,496.50	25,000.00
3. Furniture, furnishings and equipment described in Article 3 of Property Settlement Agreement	15,000.00	10,000.00
4. Packard automobile described in Article 4 of Property Settlement Agreement	2,180.17	2,000.00
5. Jewelry described in Article 5 of Property Settlement Agreement	3,000.00	2,000.00
	78,961.28	74,000.00
Less depreciation items 2 and 4	1,740.84	nil
	77,220.44	74,000.00
Cash paid to Esther Jeanne Johnson his then wife by plaintiff as provided in Article 6 (net-cost) of Property Settlement Agreement	6,000.00	6,000.00
Total	$83,220.44	$80,000.00

[Endorsed]: Filed 9-18-1941.

PLAINTIFF'S EXHIBIT No. 3

COST TO COMMUNITY AND MARKET VALUE OF PROPERTY RECEIVED AND LIABILITIES PAID BY TODD W. JOHNSON UNDER PROPERTY SETTLEMENT AGREEMENT DATED MARCH 4, 1935.

		Cost to Community	Market Value March 4, 1935
1.	Real Estate described in Article 8(a) of Property Settlement Agreement	3,000.000	1,500.00
2.	Real Estate described in Article 8(b) of Property Settlement Agreement	1,845.28	500.00
3.	Real Estate described in Article 8(c) of Property Settlement Agreement	31,355.08	30,000.00
4.	300 shares Citizens Bank described in Article 9 of Property Settlement Agreement	8,095.25	6,000.00
5.	200 shares Dunhill International described in Article 9 of Property Settlement Agreement	4,322.50	1,000.00
6.	Auburn automobile described in Article 9 of Property Settlement Agreement (Cost estimated)	1,500.00	1,000.00
7.	Cash in Banks as set forth in Article 9 of Property Settlement Agreement	6,350.96	6,350.96
8.	Accounts receivable for legal fees due plaintiff, collected in 1935, as set forth in Property Settlement Agreement	No Cost	31,958.67
9.	Johnson and Johnston—accounts receivable collected in 1935, as set forth in Property Settlement Agreement	No Cost	20,069.78
		56,469.07	98,379.41
	Depreciation on items 3 and 6	1,850.00	
		54,619.07	
	Liabilities paid by Plaintiff under Property Settlement Agreement		
	1934 Income Tax of plaintiff paid by plaintiff	5,082.78	5,082.78
	1934 Income Tax of Esther Jeanne Johnson paid by plaintiff	5,082.78	5,082.78

Cost to Community and Market Value of Property Received and Liabilities Paid by Todd W. Johnson Under Property Settlement Agreement Dated March 4, 1935—(Continued.)

	Cost to Community	Market Value March 4, 1935
1935 Income Tax of plaintiff paid by plaintiff	3,118.95	3,118.95
1935 Income Tax of Esther Jeanne Johnson paid by plaintiff	3,118.95	3,118.95
	16,403.46	16,403.46
Difference	38,215.61	81,975.95

[Endorsed]: Filed 9-18-1941.

Mr. Mitchell: May it be clear for the record that the defendant is stipulating that the witness, Mr. Johnson, the plaintiff, would testify as set forth in the exhibits, and call the Court's attention to the fact that the costs as set forth in the first column in each exhibit, Plaintiff's Exhibits 2 and 3, are the costs of certain tangible properties to the community, the community cost, not Mr. Johnson's cost nor Mrs. Johnson's cost basis for the community cost basis.

The Court: Mr. Mitchell, make that just a little clearer, because evidently you have a distinction there in mind. If these properties were paid for out of community funds, then it is community property.

Mr. Mitchell: That is true.

The Court: And the cost is community cost.

Mr. Mitchell: Correct. [81]

So as to explain my reason for that limitation, it is the Government's contention that Mr. Johnson's cost basis is much greater than Mrs. Johnson's cost basis, because Mr. Johnson's interest in community property is much greater than Mrs. Johnson's interest in community property, and that Mrs. Johnson gave up certain rights, statutory rights, to support and so on, that have a value, and which enter into her cost basis.

In other words, these figures are valueless insofar as determining the cost basis and market value of Mrs. Johnson's interest, or insofar as determining the cost basis of Mr. Johnson's interest or the market value of his interest at the time of the agreement because of the great difficulty in the value of his interest and the value of her interest.

[82]

TODD W. JOHNSON

recalled as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Mr. Johnson: Before you begin your cross examination, Mr. Mitchell, may I ask the Court if my testimony is as an adverse witness for the defendant, may it also be regarded as my direct testimony for the plaintiff.

The Court: Yes.

(Testimony of Todd W. Johnson.)

Cross Examination

By Mr. Mitchell:

Q. Did you receive rents from the Pico property for one year in accordance with Paragraph 7 of the agreement [83] amounting to during that year $2,179.74?

A. I did. I might say that in originally preparing that statement, that I considered that the bills paid, current bills, were somewhat more than that and I did not take that item into consideration for that reason.

Q. Mr. Johnson, referring again to Plaintiff's Exhibit 3, the last item entitled "1935 Income Tax of Esther Jeanne Johnson paid by Plaintiff," why do you put that in two columns? You have a column here of income taxes, the cost to community of income taxes paid. Is that for comparing the column to the totals of the column?

A. It is for the purpose of comparing market values with cost values. That would be in the nature of an assumption of a liability and in the purchase of a property, so that if you assume certain debts you would get that much less.

Q. Then you are not testifying that the left-hand column following the 1934 and 1935 taxes paid by you are cost to the community, are you? [84]

A. No. This is Exhibit 3. The actual book costs of the property received was $54,619.07, less debts of $16,403.46, which I assumed, so that actually the difference would be $38,215.61.

(Testimony of Todd W. Johnson.)

Likewise, the market value of the property received was $98,379.41, and I assumed $16,403.46 debts, so that I received a net property above debts of $81,975.95. That was put there for comparison of what I got out of the property settlement as compared to what my wife received out of it.

Q. Now, Mr. Johnson, prior to the time the property settlement agreement and your negotiations with Mr. Gilbert, about which you testified this morning, did Mr. Gilbert at that time promise that when he drafted the divorce complaint he would not ask you for any alimony, temporary or permanent, or for costs or attorney's fees, other than what you agreed to in the property settlement agreement? [85]

The Witness: Well, I don't remember his promising me that exact thing, Mr. Mitchell. It was just understood that there wasn't any alimony involved. [86]

Q. Now, about this item 8 in Plaintiff's Exhibit 3. Item 8 reads, "Accounts Receivable for Legal Fees due Plaintiff, Collected in 1935, as set forth in Property Settlement Agreement."

That means collected after March 4, 1935, does it not?

A. Between March 4, 1935, and December 31, 1935. [88]

Q. As of March 4, 1935, how were you able to estimate that exactly one-half of earned but uncollected accounts receivable of the partnership, that

(Testimony of Todd W. Johnson.)
is, your interest, one-half of your interest, was $20,069.78?

A. That represented the accounts receivable which were due and were payable for work finished.

Q. Gross? A. Yes, gross.

Q. You didn't know then what your net profit for the year would be, did you?

A. Not exactly, no.

Q. You didn't know what the expenses would be the bal- [89] ance of the 10 months of the year?

A. I didn't know exactly what they would be. I could have made a pretty close approximation.

Q. You didn't know what the gross assets would be for the balance of the year?

A. That is true. [90]

Q. What was the age of your wife as of the date of the agreement?

A. I believe 30 years.

Q. 30 years old? A. Yes. [91]

Mr. Johnson: Mr. Gilbert informed me that he wouldn't contend in our negotiations that my wife was not capable of earning her own living, that he would admit that for the purpose of our discussions, and from the very beginning that was not brought up again, excepting it was understood that there would be no claim other than the property settlement agreement itself.

Mr. Mitchell: No claim for alimony you mean.

Mr. Johnson: No other claim of alimony or any other kind, excepting as shown in the property settlement agreement. [94]

(Testimony of Todd W. Johnson.)

Mr. Johnson: Your Honor, at this time I would like to make a motion, and in support of that motion——

Mr. Johnson: The motion I would like to make would be to amend the prayer in my complaint to ask for a refund of $7,148.11——

The Court (Interrupting): $7,148.11.

Mr. Johnson (Continuing): ——plus interest as allowed by law in lieu of the prayer as it now stands, which asks for a refund of $3,828.15, plus interest as allowed by law.

The increased amount of refund represents the exact amount of deficiency income tax which the Commissioner pro- [133] posed to assess against me and which was paid, partly in cash and partly by credit. [134]

I don't have any sound reasons for resisting counsel's motion. So far as his theory is concerned as expressed today, it is the very theory that I thought he was relying on all the time as an alternative theory to the gift theory, and I don't see any difference so far as the general theory is concerned, but my only thought is that he now has figured out under the same theory that he is entitled to a larger refund than he was before.

The Court: The amendment will be allowed. [145]

The Court: Do you rest, Mr. Johnson?

Mr. Johnson: Yes, I rest.

Mr. Mitchell: If the Court please, for the record

(Testimony of Todd W. Johnson.)
I would like to make a motion at this time to strike out all testimony and evidence relating to values, both the cost basis and values, upon all of the grounds that I stated in support of my objection to the introduction of that very testimony. [147]

The Court: The motion will be denied. An exception allowed the Government.

Mr. Mitchell: Now, Mr. Johnson, as attorney for your- [150] self will you stipulate that Mrs. Johnson filed no gift tax return reporting any gifts received from you or any gifts from her to you in the year 1935?

Mr. Johnson: I will.

Mr. Mitchell: Will you also stipulate that you filed no gift tax return and paid no gift tax upon any gifts by you to Mrs. Johnson in the year 1935 or by virtue of any gifts from her to you in the year 1935?

Mr. Johnson: I will.

Mr. Mitchell: Will you stipulate that no children were born of the marriage with Mrs. Esther Jeanne Johnson?

Mr. Johnson: I will. [151]

Mr. Mitchell: Mr. Johnson has already been sworn and he is again called as an adverse witness under Rule 43, Section B.

Direct Examination

By Mr. Mitchell:

Q. Mr. Johnson, one paragraph of the agree-

(Testimony of Todd W. Johnson.)

ment of March 4, 1935—I refer to paragraph 13—reads as follows: "It is further agreed that this agreement shall be in lieu of all other compensation or claims of any kind in favor of either party against the other * * *."

Since the execution of that agreement, has Mrs. Johnson ever made any claim to you for support or alimony or any other claim at all?

A. No, she has not.

I might add, Mr. Mitchell, that I have been informed that she fared very badly financially in the management of her properties, and that an attorney was consulted by her with the idea of determining whether or not she could get any more out of me. That is the only information that I have. She herself to me direct has never made a claim.

Q. Has any agent on her behalf made a claim against you? [152]

A. The attorney told me that he had been approached, and he had informed her that she had no standing legally.

Q. So that no claim was made against you?

A. Well, no, not actually to me by her.

Q. Or by any agent?

A. By her filing suit or anything like that. That is what happened.

Q. I have here two quit claim deeds, Mr. Johnson, from Esther Jeanne Johnson to yourself, which are duly recorded, each is dated March 4, 1935, and ask whether these—they are signed "Esther Jeanne

(Testimony of Todd W. Johnson.)

Johnson" and duly acknowledged—were delivered to you at about the time they were signed.

A. They were at the time they were signed.

Mr. Mitchell: If the Court please, I think counsel will stipulate that the properties described in these quit claim deeds were the three parcels of real estate described in paragraph 8 of the property settlement agreement, paragraphs 8(a), 8(b), and 8(c).

Is that correct, Mr. Johnson?

The Witness: They are the same properties described in the property settlement agreement, but I can't tell you under which paragraph, which came to me. [153]

Mr. Mitchell: One deed covers Lots 21 and 22 of Tract No. 6073, as recorded in Book 63, page 13 of Maps. This describes one parcel of property and recites that it was held in the name of Todd W. Johnson. The portion that I desire to read in the record from this schedule is as follows. (It is in parentheses):

> "(This release is made to carry out the mutual agreement entered into in that the said property hereinafter referred to shall be and become the sole and separate property of Todd W. Johnson.)"

The other deed covers two parcels of property, the first Lot 49, Tract 8025, and the second parcel being Lots 142 and 161, 162, 163, 164, and 165 or Tract 5070. Following the description is the following paragraph which reads as follows:

(Testimony of Todd W. Johnson.)

"This conveyance is made by Esther Jeanne Johnson (also known as E. Jeanne Johnson) to Todd W. Johnson to carry out the mutual agreement entered into in that the said property hereinabove referred to shall be and become the sole and separate property of said Todd W. [154] Johnson." [155]

Mr. Mitchell: If the Court please, the defendant desires to introduce a certified copy of the income tax return for 1935, filed by Todd W. Johnson, and ask that it be marked Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A.

(The income tax return referred to was received in evidence and marked "Defendant's Exhibit A.")

DEFENDANT'S EXHIBIT A

United States of America
Treasury Department
Washington

March 10, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Individual Income Tax Return for 1935, (with rider

(Testimony of Todd W. Johnson.)

attached), filed by Todd W. Johnson, Los Angeles, California, filed in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD

Chief Clerk, Treasury Department.

WHB JWB S S F J P W H

umb

FILE

MARKED "DUPLICATE" ... THE ORIGINAL RETURN

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1935

or fiscal year begun ...., 1935, and ended ...., 1936

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

PRINT NAME AND ADDRESS PLAINLY BELOW

TODD W. JOHNSON
(Name)
433 South Spring Street,
(Street and number, or rural route)
Los Angeles, California
(Post office) (County) (State)

Tax ... $ 7821.89
Penalty -
Interest - 1025.84
Total $ 8,847.73
Basis RAR 4/23/38
Audited by RJG
Date ... 2-25/17/38

Do Not Write in These Spaces
File Code 1469
Serial Number 200046
District
(Cashier's Stamp)
Cash Check M.O.
First Payment

1. State whether you are (a) a citizen of the United States, or (b) a resident alien: Citizen
4. Were you married and living with husband or wife during your taxable year? ... ... Rider
7. Name of husband or wife: Katherine ... Johnson
8. State whether your books are kept on cash or accrual basis: Cash
9. State principal occupation or profession: Attorney
11. Did you transfer to or receive from any one person money or property in excess of $5,000 during the calendar year 1935, without an adequate and full consideration in money or money's worth? No
12. Did any person or persons other than yourself prepare this return for you? No
13. Did you make a return of information on Forms 1096 and 1099 for the calendar year 1935?
Number of dependent persons (other than husband or wife) under 18 years of age or incapable of self-support receiving their chief support from you during your taxable year? None

ATTACH REMITTANCE HERE

INCOME

1. Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) Self employed ... $ ...212
2. Net profit (or Loss) from Business or Profession. (From Schedule A)
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
5. Income (or Loss) from Partnerships, Syndicates, Pools, etc.
6. Income from Fiduciaries. (Furnish name and address)
7. Rents and Royalties. (From Schedule B)
8. Capital Gain (or Loss). (From Schedule C)
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D, Line (g))
10. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1934 Act
(b) Domestic Corporations not subject to taxation under Title I of 1934 Act
(c) Foreign Corporations
11. Other Income. (State nature) (Use separate schedule, if necessary)
12. Total Income in Items 1 to 11

E. SURVEY REVIEW
SEP 6 1940
By: H. B. Ripy

DEDUCTIONS

13. Interest Paid. (Explain in Schedule F)
14. Taxes Paid. (Explain in Schedule F)
15. Losses by Fire, Storm, etc. (Explain in table at foot of page 2)
16. Bad Debts (including bonds determined to be worthless during taxable year) (Explain in Schedule F)
17. Contributions. (Explain in Schedule F)
18. Other Deductions Authorized by Law (including stock determined to be worthless during taxable year). (Explain in Schedule F)
19. Total Deductions in Items 13 to 18
20. Net Income (Item 12 minus Item 19)

COMPUTATION OF TAX (See Instruction 23)

21. Net income (Item 20 above)		$ ... 541 15	29. Normal tax (4% of Item 28)
22. Less: Personal exemption	$ 1,2.. 00		30. Surtax on Item 24 (see Instruction 23)
23. Credit for Dependents (Explain in Schedule F)		1 000	31. Total tax (Item 29 plus Item 30)
24. Balance (Surtax net income)		$ ... 541 15	32. Less: Income tax paid at source (2% of Item 4)
25. Less: Interest on Liberty bonds, etc. (Item 9)	$		33. Income tax paid to a foreign country or U. S. possession
26. Dividends. (Item 10 (a))	217 50		34. Balance of Tax. (Item 31 minus Items 32 and 33)
27. Earned income credit. (See Instruction 27)	1,400 00	1 617 50	
28. Balance subject to normal tax		$ ... 23 ... 63	

AFFIDAVIT (See Instruction 27)

I/we swear (or affirm) that this return (including its accompanying schedules and statements, if any) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

Sworn to and subscribed by Todd W. Johnson before me this 18th day of January, 1936
L. C. Johnson
Todd W. Johnson

NOTARIAL SEAL

A RETURN MADE BY AN AGENT MUST BE ACCOMPANIED BY POWER OF ATTORNEY (See Inst. 27)

AFFIDAVIT (See Instruction 27)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Sworn to and subscribed before me this ...... day of ...., 193 .

Todd W. Johnson

NOTARIAL SEAL

U. S. GOVERNMENT PRINTING OFFICE

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a-1

10. Salaries not included on ... not deduct compensation		
11. Interest on business indebtedness to others 1/2	627	41
12. Taxes on business and business property 1/2	1,562	88
13. Losses (explain in table at foot of page)		
14. Bad debts arising from sales or services 1/2	2,975	10
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page) 1/2	933	75
16. Rent, repairs, and other expenses (itemize below or on separate sheet)	1,233	68
17. Total (Lines 10 to 16)	$ 7,332	22
18. Total Deductions (Line 6 plus Line 17)	7,332	22
19. Net Profit (or Loss) (Line 1 minus Line 18) (Enter as Item 2)	$ 26,541	1..

Items of deductions on Lines 8 and 16: 1/2 Office Expense $ 263.12, Repairs 1/2 $45.59, Insurance 1/2 $636.10
Miscellaneous Expense 1/2 $288.76

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)
	$	$	$	$	$	$

Explanation of deductions claimed in Column 6.

SCHEDULE C—CAPITAL GAINS AND LOSSES (From Sales or Exchanges Only) (See Instruction 8)

1. Description of Property	2. Date Acquired	3. Date Sold or Exchanged	4. Gross Sales Price (Contract price)	5. Cost or March 1, 1913, Value if Acquired Before That Date (Indicate basis)	6. Cost of Improvements Subsequent to Acquisition or March 1, 1913	7. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913 (Furnish details)	8. Gain or Loss	9. Percentage of Gain or Loss to be Taken into Account	10a. Gains	10b. Losses
(a) 1 year or less	Mo. Day Year	Mo. Day Year	$	$	$	$	$	100	$	$
(b) Over 1 year but not over 2 years								80		
(c) Over 2 years but not over 5 years								60		
(d) Over 5 years but not over 10 years								40		
(e) Over 10 years								30		

(f) Total Gains and Losses (Enter net amount as Item 8) (Capital losses are allowable only to the extent of $2,000 plus capital gains) $ | $

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Obligations or Securities	2. Amount Owned at End of Year	3. Interest Received or Accrued During the Year	4. Principal Amount Exempt from Taxation	5. Amount Owned in Excess of Exemption	6. Interest on Amount in Excess of Exemption
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	$	$	All	x x x x x x	x x x x x x x x
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	x x x x x x x x	x x x x x x x x
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917			All	x x x x x x x x	x x x x x x x x
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	x x x x x x x x	x x x x x x x x
(e) Liberty 4% and 4¼% Bonds; U.S. Savings Bonds; Treasury Bonds. Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			$5,000	$	$
			None		
(f) Total (enter total of column 6 as Item 9)					$

SCHEDULE E—INCOME FROM DIVIDENDS

Itemize all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends

[illegible] Southern California [illegible]

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 13, 14, 16, 17, AND 18, AND CREDIT CLAIMED IN ITEM 23

Depreciation 1/2 1,[illegible]7.50 1/2 [illegible]
Repairs 1/2 1.17 [illegible]
Insurance 1/2 1,7[illegible] [illegible]
Misc. Expense 1/2 77.58 [illegible] .28

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or March 1, 1913, Value if Acquired Prior to That Date (Indicate basis)	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or Allowable) in Prior Years	6. Remaining Cost or Other Basis to be Recovered	7. Life Used in Accumulating Depreciation	8. Estimated Remaining Life from Beginning of Year	9. Depreciation Allowable This Year
1/2 [illegible]	1/1/06	2,[illegible]		[illegible]	[illegible]		7	[illegible]
1/2 Store [illegible]	1933	$ 1,[illegible] 00	$	$ [illegible]	$ [illegible]		22	$
1/2 Store [illegible]	1934	2,[illegible]		[illegible]	[illegible]		23	
1/2 Frame Bldg.	1936	7,000 00		[illegible]	[illegible] 34			

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost	4. Subsequent Improvements	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss
		$	$	$	$	$

62

a.2

(Testimony of Todd W. Johnson.)

Rider

An interlocutory decree, granting divorce and approving property settlement between Todd W. Johnson and Esther Jeanne Johnson, husband and wife, was made by the Superior Court, Los Angeles County, California, on March 29, 1935. Under the California Law the final decree can be obtained any time after March 29, 1936, if the parties do not live together as husband and wife prior to said time. Until or unless a final decree is made by said Superior Court, the parties are husband and wife the same as if no interlocutory decree had been made.

Therefore, the returns of the parties are made as husband and wife, but a personal exemption of only $1,000.00 each is claimed, total exemption—$2,000.00, instead of claiming $2,500.00 personal exemption, which is allowable to a husband and wife who live together during all of the calendar year.

[Endorsed]: Filed 9/17/41.

Mr. Mitchell: And also the information income tax return filed by the partnership of Johnson and Johnston for the year 1935, and ask that it be marked Defendant's Exhibit B.

The Clerk: Defendant's Exhibit B.

(The income tax return referred to was received in evidence and marked "Defendant's Exhibit B.")

(Testimony of Todd W. Johnson.)

DEFENDANT'S EXHIBIT B

United States of America
Treasury Department
Washington

March 10, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Partnership Return of Income for 1935, filed by Johnson and Johnston, Los Angeles, California, filed in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.
F. A. BIRGFELD
Chief Clerk, Treasury Department.

WHB JWB S S F J P W H
umb

[Endorsed]: Filed 9/17/40

FORM 1065 — DUPLICATE — MUST BE FILED WITH THE ORIGINAL

PARTNERSHIP RETURN OF INCOME

(TO BE FILED ALSO BY SYNDICATES, POOLS, JOINT VENTURES, ETC.)

For Calendar Year 1935

Or Fiscal Year begun ...., 1935, and ended ...., 1936

File This Return Not Later Than the Fifteenth Day of the Third Month Following the Close of the Taxable Year

PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION

JOHNSON & JOHNSTON (Name)

433 South Spring Street. (Street and number)

Los Angeles, California (Post office and State)

Business or Profession: Attorneys at Law

Nature of Organization: Partnership (Partnership, syndicate, pool, joint venture, etc.)

Date of Organization: June 1st, 1933

Do Not Write in These Spaces

File Code: 466

Serial Number: 970083

District: 6-Calif

(Date Received)

REVIEWED SECTION E-2 BY R F B JAN DATE MAY 13 1938

RAR 1/15/37 Conf 2/2/38

T.S. 1/15/38

1. Did any person or persons other than the organization ... [illegible] ... Yes

GROSS INCOME

Item			
1. Gross Receipts from Business or Profession		42 652 72	
2. Less Cost of Goods Sold: (a) Inventory at beginning of year	$		
(b) Merchandise bought for sale			
(c) Cost of labor, supplies, etc. (From Schedule A)			
(d) Total of lines (a), (b), and (c)	$		
(e) Less inventory at end of year			
3. Gross Profit from Business or Profession (Item 1 minus Item 2)			
4. Income (or loss) from Other Partnerships, Syndicates, Pools, etc.			
5. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)		1 · 10	
6. Interest on Tax-free Covenant Bonds upon which a Tax was Paid at Source			
7. Rents			
8. Royalties			
9. Capital Gain (or loss). (From Schedule B)			
10. Dividends on Stock of (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934			
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934			
(c) Foreign Corporations			
11. Other Income (state nature of income): (a)			
(b)			
12. Total Income in Items 3 to 11			42 653 82

DEDUCTIONS

Item		
13. Salaries of Employees. (Do not include compensation for partners or members)	4 228 40	
14. Rent on Business Property	1 960 00	
15. Repairs. (From Schedule C)		
16. Interest on Indebtedness	45 00	
17. Taxes paid. (From Schedule D)	14 03	
18. Losses by Fire, Storm, etc. (From Schedule E)		
19. Bad debts (from Schedule F); also bonds determined to be worthless during taxable year.		
20. Charitable Contributions.		
21. Depreciation	736 72	
22. Other Deductions Authorized by Law including stock determined to be worthless during taxable year: Office Expense $1,274.84; Dues and Subscriptions $1,437.24	2 711 98	
23. Total Deductions in Items 13 to 22		9 696 33
24. Net Income. Item 12 minus Item 23		32 956 49

25.

PARTNERS' OR MEMBERS' SHARES OF INCOME AND CREDITS

(See Instruction 25)

1. Name and Address of Each Partner or Member	2. Percentage of Net Income	3. Dividends from 10(a) Above	4. Taxable Income	5.	6.	7.
(a) Todd W. Johnson		$ 24,716 61		$	$	$
(b) Philip D. Johnston		8,238 88				
(c)						
(d)						
(e)						
(f)						
(g)						
Totals		$	$	$	$	$

65

[illegible]	Amount	Items	Amount
	$		$
		Total (enter as Item 2 (c))	$

SCHEDULE D—CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) (See Instruction 8)

1. Description of Property and Period Held	2. Date Acquired	3. Date Sold or Exchanged	4. Gross Sales Price (Contract Price)	5. Cost or March 1, 1913, Value if Acquired Before That Date (Indicate basis)	6. Cost of Improvements Subsequent to Acquisition or March 1, 1913	7. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913 (Furnish details)	8. Gain or Loss	9. Percentage of Gain or Loss to be Taken into Account	10. Gain or Loss to be Taken into Account: a. Gains	b. Losses
(a) 1 year or less	Mo. Day Year	Mo. Day Year	$	$	$	$	$	100	$	$
(b) Over 1 year but not over 2 years								80		
(c) Over 2 years but not over 5 years								60		
(d) Over 5 years but not over 10 years								40		
(e) Over 10 years								30		

(f) Total Gains and Losses (Enter net amount as Item 9) (Capital losses are allowable only to the extent of $2,000 plus capital gains) $ | $

State (1) how and from whom property was acquired .... (2) Personal or business relationship.

SCHEDULE C—COST OF REPAIRS (See Instruction 15)

1. Items	2. Amount (Enter as Item 17)
	$

SCHEDULE D—TAXES PAID (See Instruction 17)

1. Items	2. Amount (Enter as Item 17)
County Taxes	$ 14 03

SCHEDULE E—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 18)

1. Kind of Property	2. Date Acquired	3. Cost	4. Subsequent Improvements	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage	7. Deductible Loss (Enter as Item 18)
		$		$	$	$

State how property was acquired

SCHEDULE F—EXPLANATION OF DEDUCTION FOR BAD DEBTS (See Instruction 19)

	Year	Net Income	Charged on Account	Bad Debts
(a)	1932	$		$
(b)	1933			
(c)	1934			
(d)	1935			

SCHEDULE G—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 21)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or March 1, 1913, Value if Acquired Prior to That Date (Indicate basis)	4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Allowed (or Allowable) in Prior Years	6. Remaining Cost or Other Basis to be Recovered	7. Life Used in Accumulating Depreciation	8. Estimated Remaining Life	9. Depreciation Allowable This Year
Auto	6/1/33	$ 2,637 69	$	$ 1,044 07	$ Sold 10/31/35		-	$ 543 52
Furn. & Fix.		1,894 06		231 88			7½	189 40
								736 92

SCHEDULE H—NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC. (See Instruction 26)

1. Obligations or Securities	2. Amount Owned at End of Year	3. Interest Received or Accrued During the Year
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or U. S. possessions	$	$
(b) Obligations issued under the provisions of the Federal Farm Loan Act, or under such act as amended		
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917		
(d) Treasury notes, Treasury bills, and Treasury certificates of indebtedness		
(e) Liberty 4% and 4¼% Bonds, U. S. Savings Bonds, and Treasury Bonds		
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)		

SCHEDULE I—INCOME FROM DIVIDENDS

Itemize all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends:

AFFIDAVIT (See Instruction 30)

I swear (or affirm) that this return (including its accompanying schedules and statements, if any) has been examined by me, and, to the best of my knowledge and belief, is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

Sworn to and subscribed before me this 16th day of January, 1936

[NOTARIAL SEAL] L. L. Johnson (Signature of officer administering oath) Notary Public (Title)

Philip D. Johnston (Signature of taxpayer)

439 S. Spring St (Address of taxpayer)

AFFIDAVIT (See Instruction 30)

I/we swear (or affirm) that I/we prepared this return for the organization named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Sworn to and subscribed before me this ________ day of ________, 193__

[NOTARIAL SEAL] ________ (Signature of officer administering oath) ________ (Title)

(Signature of person preparing the return) Philip D. Johnston (Signature of person preparing the return)

(Name of firm or employer, if any) 66

D-2

(Testimony of Todd W. Johnson.)

Mr. Johnson: No objections.

Mr. Mitchell: Mr. Johnson, as your attorney will you stipulate that the income tax return of Esther Jeanne Johnson for the year 1935 was made out in your office under your supervision by your secretary or bookkeeper?

Mr. Johnson: By me.

Mr. Mitchell: Made out by you?

Mr. Johnson: Yes.

Mr. Mitchell: And will you stipulate that it was identical with the return filed by you which is now in evidence as Defendant's Exhibit A?

Mr. Johnson: It was identical with the exception of [158] name, address, signature, and if it was necessary to change the gender in pronouns, that was changed.

Mr. Mitchell: Does your stipulation include the answer to Question No. 11, appearing at the top of the return, answer to questions?

Mr. Johnson: Yes.

Mr. Mitchell: Mr. Johnson, as your attorney, will you also stipulate to the following facts regarding the complaint of Esther Jeanne Johnson v. Todd W. Johnson, Superior Court, Los Angeles County, No. 129957:

That the suit was commenced by filing Mrs. Johnson's complaint on the 5th of March 1935. That has already been stipulated in the stipulation of facts that the grounds alleged in the complaint were cruelty;

(Testimony of Todd W. Johnson.)

That the interlocutory decree was entered on the 1st of April, 1935;

That the final decree was entered on April 2, 1936;

That paragraph 4 of the complaint reads as follows: "That on the 4th day of March 1935, plaintiff and defendant entered into an agreement in writing, settling and determining their respective property rights arising from said marriage, which agreement in writing obligates defendant, among other things, to pay to plaintiff for her support and maintenance the sum of $500 per month, payable at the rate of $250 on the 1st and $250 on the 15th of each month, commencing as of March 1, 1935, and continuing for a period of 12 months"; [159]

That paragraph 2 of the prayer of the complaint reads as follows: "That the property settlement agreement entered into between plaintiff and defendant be approved by this honorable court, and that the applicable parts thereof be incorporated in the decree of this honorable court";

That paragraph 3 reads, "A prayer for general relief";

That the complaint is signed by W. I. Gilbert and Hugh W. Darling, attorneys for the plaintiff;

That the default of the defendant was requested and entered in due course;

That the interlocutory decree was dated March 29, 1935, and was docketed and entered on April 1, 1935, in Book 903, page 249;

(Testimony of Todd W. Johnson.)

That the interlocutory decree recites the default of the defendant. It adjudges that the plaintiff is entitled to a divorce one year after the entry of the interlocutory decree, and that the decree contains the following paragraphs:

"It is further adjudged that the property settlement agreement between plaintiff and defendant dated the 4th day of March 1935, an executed copy of which was introduced into evidence and marked Plaintiff's Exhibit 1, be, and it is, hereby approved;

"It is further adjudged that the defendant be, and he is hereby, ordered to pay to plaintiff as alimony for her support and maintenance the sum of $500 per month for a period of one year, commencing as of the first day of March 1935, payable at the rate of $250 on the 1st of each month [160] and $250 on the 15th of each month."

That there was no award of costs or attorneys' fees in the decree, and no mention in the decree of a division of community property other than the reference to the agreement;

That the final decree was dated April 2, 1936, and was entered and docketed on the same day in book 935, page 349;

That the final decree recites the entry of the interlocutory decree, dissolves the bonds of matrimony, and adjudges a divorce; and it further contains the following paragraph:

"It is further ordered and decreed that wherein said interlocutory decree makes any provision for

(Testimony of Todd W. Johnson.)

alimony or the custody and support of children, said provision be, and the same is hereby, made binding on the parties affected thereby, the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be, and the same is hereby, assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto";

That the summons and complaint in the case was personally served upon the defendant, Todd W. Johnson, on the 6th of March 1935, and that a certified copy of the interlocutory decree was personally served upon the defendant, Todd W. Johnson, on April 3, 1935.

Mr. Johnson: I will.

Mr. Mitchell: The defendant rests, your Honor.

[161]

Mr. Mitchell: If the Court please, may I just make this suggestion: If the Court should ultimately decide that the transaction is a sale and purchase transaction, which will necessitate going into the considerations paid and received by each of the parties, the Government may desire to introduce some expert testimony, and I think it would be difficult for the Court to decide the value of certain intangible rights and powers without the assistance of an expert, but that would entail considerable expense and considerable time.

(Testimony of Todd W. Johnson.)

The Court: I might consider it, but I don't believe there is any expert in the world that could give you or myself any light on those intangibles. It is just a wild guess. [164]

[Endorsed]: No. 10214. United States Circuit Court of Appeals for the Ninth Circuit. Todd W. Johnson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed August 7, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit
No. 10214

TODD W. JOHNSON,
Plaintiff and Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant and Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY UPON APPEAL

Appellant hereby adopts and relies upon the Statement of Points filed in the trial or District

Court and designates the following parts of the record on appeal as necessary for consideration of said appeal and to be printed:

[Here follows designation by appellant of portions of transcript to be printed.]

Dated: August 6th, 1942.

TODD W. JOHNSON
In Propria Persona, Appellant.

Received copy of the within Statement of Points on Which Appellant Intends to Rely Upon Appeal and Designation of Parts of Record to Be Printed this 6th day of August, 1942.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL
Assistant United States Attorney.

By E. H. MITCHELL
Assistant United States Attorney,
Attorneys for Defendant-Appellee.

[Endorsed]: Filed Aug. 7, 1942.

In the District Court of the United States in and for the Southern District of California
Central Division

No. 1195-O'C

TODD W. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION TO AMEND AND TO MAKE ADDITIONAL FINDINGS AND CONCLUSIONS UNDER RULES 52(b) and 59(a) (2)

The defendant above named moves (1st) that the Findings of Fact and Conclusions of Law, heretofore concurrently entered with the Judgment in above case on the 30th day of June 1942, be amended in the particulars hereinafter pointed out and (2d) that the Court make the new and additional findings and conclusions set forth below.

FINDINGS

Defendant moves that the following findings or portions thereof as indicated be stricken or amended for the reasons and upon the grounds stated.

I.

There is neither sufficient nor substantial evidence nor is there any law to support that portion of Finding V to the effect that the wife, as well as

the husband, "intended to and did * * * dispose of" the community property which was the subject of the agreement. [74]

A married woman, during marriage, cannot "dispose" of community property traceable to her husband's earnings.

II.

There is neither sufficient nor substantial evidence to support that portion of Finding VII to the effect that the $6,000.00 alimony payment alone, or any part thereof alone, was, "in full satisfaction of and constituted a complete discharge of" the husband's legal duty to support and maintain his wife.

The agreement must be read as a whole and it contains no such provision or expression of intent. A written contract cannot be so amended by a court in the absence of fraud or mutual mistake.

III.

There is neither sufficient nor substantial evidence, nor is there any law, to support that portion of Finding VIII to the effect that the wife "disposed" of her so-called "half interest" in the community property. (P. 3, lines 21-24)

It is elementary that California wives cannot "dispose" of their limited interests in community property during marriage.

Defendant moves that the following be substituted for such portion of Finding VIII, to-wit:

In so far as it related to community prop-

erty, real and personal, the wife "conveyed" nothing, but did release and relinquish her statutory marital rights in respect of the items transformed by the agreement into the husband's separate property. As between the parties themselves, no written instruments of conveyance or transfer, other than the agreement, [75] was necessary to legally transform such community property, real or personal, into the separate property of either spouse, regardless of the name or names in which held.

IV.

There is no evidence whatsoever to support the following portion of Finding IX, to-wit:

> the value of the undivided one-half interest of each spouse in said community properties, at the time of the agreement, was also exactly one-half the value of the whole property.

Such portion of Finding IX is also incomplete and misleading, unless there be added thereto the following, to-wit:

> The interest of the wife, however, in and to such community properties did not, at such time, include the right or power to use, possess, control, manage, contract respecting, pay debts with, sell, mortgage, pledge, or otherwise dispose of her so-called "one-half interest" therein. All such rights and powers were then vested exclusively in plaintiff to the extent of 100% thereof. His wife did then have

power, however, by contract with plaintiff but with no one else, to transform such community property into the separate property of herself or husband. She also had power to set aside any gifts thereof which might have been made by plaintiff without her consent. None of the ordinary incidents or attributes of ownership could accrue to her in respect of such community property except by agreement with plaintiff, by a gift from her husband, by divorce, or by plaintiff's prior death. The [76] fundamental purpose of the community property system is, and always has been, to safeguard and protect wives against want, upon the future possible dissolution of marriage by the death of husbands and by divorce. None of the burdens or obligations of ownership of community property traceable to the husband's earnings are imposed upon the wife. All are imposed personally and exclusively upon the husband to the extent of 100% thereof.

The finding to the effect that the value of the wife's interest in community property is equal to the value of the husband's interest is supported by no evidence whatever.

V.

The words "disposed of and", appearing in Finding X, p. 4, line 3, should be stricken, in so far as it relates to the disposal of community property by the wife. While she had power to "transform"

community property into the husband's separate property, by agreement with him, there is no evidence that the husband conferred upon her the power to "dispose" thereof.

VI.

Item 12 of Finding XI should be stricken. There is no evidence whatever as to the cost of cash in any bank.

VII.

The words "or the community", appearing in Finding XIII, p. 5, line 30, should be stricken. The community is not a separate entity capable of contracting or owing debts in California. [77]

VIII.

Finding XIV, in so far as it relates to the "cost" of each spouse's interest in the community property, should be stricken.

While there is evidence of the cost of certain tangible community properties, there is no evidence whatever in the record to indicate the cost to the husband of his interest therein or to indicate the cost to the wife of her interest therein.

Such portion of Finding XIV is also wholly immaterial in view of the first sentence of Finding VIII to the effect that the transaction evidenced by the agreement did not constitute reciprocal sales or exchanges. The insertion of a finding of costs can result in nothing but confusion to a reviewing court.

IX.

Findings XVI to XX, inclusive, should be stricken. They are also wholly immaterial in view of the first sentence of Finding VIII to the effect that the transaction evidenced by said agreement did not constitute reciprocal sales or exchanges.

In so far as they relate to the value and to the cost of the greatly different interests of the respective spouses in community properties, they are supported by no evidence whatever.

ADDITIONAL FINDINGS

X.

If the Court should deny defendant's motion to strike its findings relating to the value and the cost of the joint tenancy and community properties, and instead holds that such findings are material in spite of its [78] decision that the transaction evidenced by the agreement was in the nature of a division or partition (Conclusion VIII) and did not constitute reciprocal sales or exchanges, then there should be added the following finding in substance, towit:

> Plaintiff failed to establish the then value to him of his wife's release and relinquishment of her following marital rights, to-wit: (a) her right to support, maintenance or alimony for the remainder of her life; (b) her right to at least an equal division of community property in case of divorce; and (c) her right to administer upon his estate, to a probate homestead,

to a family allowance, and to inheritance in case he should predecease her during marriage. The wife's release of these marital rights and claims against plaintiff was of substantial monetary value to him and was one of the considerations for the agreement of March 4, 1935.

XI.

One of the contentions made in this case by the plaintiff is that the dissolution of the community relationship of the spouses was analogous to the dissolution of a partnership, and that the statutes and regulations relating to the realization by individual partners of taxable gains or deductible losses upon dispositions made subsequent to dissolution apply to the case at hand.

The Court decided this issue in favor of the Government, but made no finding or conclusion in response thereto. The following finding and/or conclusion, [79] therefore, should be added:

> The community property relationship existing between the spouses, at the time of the agreement, was not that of statutory or common law partners or joint adventurers, either in respect of the husband's uncollected earnings or in respect of the tangible community and joint tenancy properties. Plaintiff's collection of his earnings, which earnings were uncollected at the time of the agreement, was not a sale, exchange or disposition of property.

No such ground for recovery was set forth in his refund claim.

XII.

Another contention made by the taxpayer was that the agreement evidenced a transfer by the wife of half of certain accrued but uncollected receivables which, when collected by the transferee husband, were income taxable to the transferor wife, coming therefore within the principle invoked by the Supreme Court in the Horst and Eubank cases. The government contended to the contrary. Such issue was decided by the Court in favor of the Government, but it made no finding in response thereto. Hence, the findings are not complete unless the following be added.

> In respect of plaintiff's uncollected earnings and his contractual right to the law firm's net profits, his wife never possessed or enjoyed the legal rights, powers or interests of a statutory or common law co-partner, joint tenant or tenant in common. She never had command over the source of such earnings or net profits, and never possessed a single right, power or interest in respect thereof that she could assign to others. She could never have collected [80] the same or have commanded the payment thereof to anyone. The legal right to command, collect and receive payment of all thereof had accrued exclusively to plaintiff, was vested in him, and was not transferred to him by his wife as to all or any part thereof. Plaintiff's wife

realized no income whatever by virtue of the transformation of plaintiff's earnings and contractual right into his separate property, or by virtue of plaintiff's subsequent collection of such earnings and his share of such net profits, or by virtue of the two events or transactions combined.

Plaintiff's contention that the transformation of the accounts receivable into his separate property and his later collection thereof in the taxable year constituted the "realization" of income by his wife to the extent of one-half thereof, was not mentioned or set forth as a ground for recovery in his claim for refund.

XIII.

There is no evidence to support the following portions of the Court's Finding XXI:

1st. To the effect that the sums expended by the law firm for club dues and expenses, in the year 1935, were so expended for the then purpose of securing clients and building up firm business.

There is evidence that such was the purpose of similar expenditures made in the years 1931 and 1932, at the time of the inception of the law business. However, the evidence is undisputed that before 1935 the business had so grown that new clients and new legal business were no longer desired or needed. [81]

2nd. To the effect that "large legal fees were

received by the firm from contacts made in the year 1935 at these clubs." And

3rd. To the effect that the 1935 cost of club activities "was both ordinary and necessary to the operation in 1935 of the firm business."

CONCLUSIONS

The following conclusions of the trial Court are either misleading, inaccurate, unintelligible or immaterial, as pointed out below, and unless corrected or stricken will make for much confusion and will impose many unnecessary difficulties upon any court that may review the judgment upon the main issue herein.

I.

(a) The Court's Conclusion II is misleading because of omissions and because it is in apparent conflict with the last sentence of the Court's Finding III, p. 1, lines 28-32. Not only did the agreement "dissolve the community and joint tenancy character of the properties", but it also discharged the many marital obligations of the husband toward his wife and released him from all of the wife's legal claims against him. If the trial court is to make a conclusion as to the legal effects of the agreement, it should set forth all of such legal effects instead of merely part of them.

(b) Conclusion III is inaccurate unless amended by striking out the words "accounts receivable" (p. 8, line 21), and inserting in lieu thereof the words, "distributable profits." A firm's accounts receivable

are specific partnership property and hence are not community property. (Calif. Civ. Code, Sec. 2419 (2) (e)) [82]

(c) As it stands, Conclusion IV is also confusing and misleading in that a reviewing court would be justified in construing it to set forth the trial Court's sole reason for its decision on the main issue in this case. The Court's ultimate conclusion that all of the collections were taxable solely to the husband is based necessarily upon all the facts and all of the law. When a conclusion is based upon numerous factual and legal reasons, it is confusing, misleading and dangerous for a trial court to expressly base it upon but two facts. Particularly is this true where a party, as here, relies upon several alternative theories or contentions all of which have been decided against him. And particularly is it true where such losing party has, as here, announced his intention to appeal from such ultimate conclusion and in all probability will urge a review of the trial court's express or vaguely implied rulings upon each of such alternative contentions.

(d) Conclusion V is likewise inaccurate and misleading to the extent that it refers to "transfers" of community assets by each spouse to the other. It is to such extent inconsistent with that portion of the Court's Finding VIII (p. 3, lines 15 and 16) and with Conclusion VIII (p. 9, lines 24-27) to the effect that the transaction was in the nature of a "partition."

In so far as Conclusion V refers to a transfer by the wife of her so-called half interest in com-

munity assets, it is also inaccurate. She merely released or relinquished those protective rights or interests conferred upon her as the then potential widow or grass-widow of plaintiff. She never had power to "transfer" an undivided half of the community property to anyone.

(e) Conclusion VII, for the same reason and in [83] so far as it refers to a "transfer" by the wife, is likewise inaccurate and misleading.

(f) Conclusions IX, X, and XI, relating to cost, are wholly immaterial since the Court, in deciding the main issue against the plaintiff (Conclusions XII, XIII, XIV and XV), necessarily concluded that neither the transformation agreement nor the subsequent collection of receivables constituted sales, exchanges or disposals of property or capital assets within the meaning of Sections 22(e), 23(j), 111, 113 or 117 of the Revenue Act of 1934. In addition to this the Court concluded (Conclusion XV, p. 11, lines 1-5) that the collection by plaintiff of the receivables constituted the realization of income by him to the extent of 100% thereof, "without the deduction therefrom of any cost or other basis."

Such being the case, Conclusions IX, X and XI relating to the proper allocation of specified costs are wholly immaterial.

It may also be said that even were the exact cost of the interest of each spouse in each item of property essential to the judgment here rendered, there is no evidence whatever to indicate the respective

amounts thereof as set forth in said Conclusions IX, X and XI.

II.

For the purpose of accuracy and clarity, to avoid confusion and inconsistencies, and to simplify the task of any reviewing court, defendant moves that Conclusions II through XV be stricken and that there be substituted therefor Conclusions II through VIII heretofore "proposed" by the Government. [84]

This motion is made upon the grounds stated, and upon the further ground that Rule 8 of this Court, requiring that all findings shall be prepared by the successful party, was not complied with in this case in respect of the main issued which was decided in favor of the Government. The motion is also made upon all of the pleadings, briefs, points and authorities, exhibits, reporter's transcript of proceedings, the opinion and the findings and conclusions in this action.

Dated: July 9, 1942.

WM. FLEET PALMER
United States Attorney
E. H. MITCHELL,
Asst. United States Attorney
By E. H. MITCHELL
Attorneys for Defendant.

[Endorsed]: Filed Jul. 9, 1942. [85]

At a stated term, to wit: The February Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 31st day of July in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable: J. F. T. O'Connor,
District Judge

[Title of Cause—No. 1195-O'C Civil.]

The motion of defendant to amend and to make additional Findings and Conclusions under Rules 52-b and 59-a, pursuant to notice filed July 16, 1942, having been argued and submitted forthwith, and the Court having duly considered the matter, now causes its Memorandum to be filed, and pursuant thereto denies the motion of defendant to amend and to make additional Findings and Conclusions.

[86]

[Title of District Court and Cause.]

MEMORANDUM

Philip D. Johnston and Otis T. Graham, Jr., Attorneys for Plaintiff, Los Angeles, California.

William Fleet Palmer, United States Attorney; E. H. Mitchell, Assistant United States Attorney; and Armond Monroe Jewell, Assistant United States Attorney, Attorneys for Defendant.

O'Connor, J. F. T., Judge.

The motion to amend and to make additional findings of fact and conclusions of law under Rule 52 (b) and 59 (a) (2) came on regularly to be heard before the court on the 27th day of July, 1942, and the court having heard arguments of counsel and having been fully advised in the premises, denies the motion to amend and to make additional findings and conclusions.

Dated July 31, 1942.

J. F. T. O'CONNOR,
Judge.

[Endorsed]: Filed Jul. 31, 1942. [87]